

# **PROCUREMENT PLANNING**

**TEXT    REFERENCE**

FEDERAL ACQUISITION INSTITUTE

CURRICULUM OF PROCUREMENT  
TRAINING COURSES

CURRENT THROUGH  
FAC 90 - 20

**OFFICE OF ACQUISITION POLICY  
GENERAL SERVICES ADMINISTRATION**

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# INTRODUCTION

## THE FEDERAL ACQUISITION INSTITUTE (FAI) CURRICULUM

### Courses

In FY91, the FAI provided acquisition trainers and educators with instructional materials for a new Contract Management curriculum. This curriculum includes the following courses, listed in a recommended order of attendance.

1. Introduction to Contracting\*
2. Procurement Planning\*
3. Small Purchases
4. Contracting By Sealed Bidding\*
5. Price Analysis\*\*
6. Contracting By Negotiation\*\*
7. Cost Analysis\*\*
8. Contract Negotiation Techniques
9. Contract Administration\*\*
10. Contract Law
11. Types of Contracts
12. Source Selection
13. Managing the Contract Office
14. Advanced Cost and Price Analysis
15. Advanced Contract Administration
16. Termination

### **Specialized Courses**

*(in alphabetical order)*

1. ADP Contracting
2. Contracting for Architect/Engineer Services
3. Construction Contracting\*\*

### Offerors

Each of the above courses will be offered by the GSA Interagency Training Center. Other Federal acquisition trainers and educators may incorporate FAI instructional materials in their respective curricula (generally under different course titles than the above).

\* Currently available.

\*\* Available in Fiscal Year 1992.

## INTRODUCTION

### THE PURPOSE OF THE FAI CURRICULUM

Help you accomplish the goals of the Federal Acquisition Process

As a Contract Specialist, your primary goals are to:

1. Obtain the optimum market response to requirements for supplies and services, in terms of:
  - Quality.
  - Timeliness.
  - Price.

While -

- Accomplishing socioeconomic objectives.
- Minimizing business and technical risks.
- Maximizing competition.
- Maintaining integrity.

2. Assure that purchased supplies and services are:
  - Delivered or performed when and where specified in the contract.
  - Acceptable, in terms of conforming to the contract's specifications or statement of work.
  - Promptly and properly reimbursed.
  - Furnished in compliance with other terms and conditions of the contract.

Help you perform your duties

To accomplish these goals, Contract Specialists perform more than 75 principal duties. Collectively, these duties constitute the Federal acquisition process. Exhibit I-1 on pages I-4 and I-5 maps the acquisition process and relates each duty to the overall process. The FAI curricula has been designed to systematically develop your skill at every duty in Exhibit I-1, in the context of accomplishing the overall goals of the Federal Acquisition Process.

Your challenge

Your challenge is to become proficient at the duties in Exhibit I-1. Granted, you may presently perform only a subset of the duties. In terms of your career, however, learning the entire range of duties will improve your competitiveness for a great variety of contracting positions, including managerial positions. From the standpoint of the Government, you will be better able to perform any one duty if you have first hand knowledge of how the duty affects, and is in turn affected by, the performance of the other duties.



## CHARACTERISTICS OF THE FAI CURRICULUM COURSES

- Each course in the curriculum will build on the skills and knowledge taught in prior courses.
- Each course covers specific duties and is designed to provide skill in performing those duties.
- Generally, there is a separate lesson for each duty, with a corresponding chapter in the Text/Reference.
- In most cases, the instructor will introduce the duty, its purpose (learning objective), applicable policies, and standards for performance.
- Next, the instructor will walk you through a flowchart of the steps in performing the duty.
- You will perform selected steps in-class, using case studies and other such exercises.
- You will be tested.
- For each duty, the Text/Reference will serve as a desk reference, with flowcharts, steps in performance, and job aids.
- Practicums (i.e., self-instructional exercises) will be available at a later date to reinforce the in-class learning back on-the-job.
- Specialized courses will not reteach the basic acquisition process but will rather concentrate on the unique regulations and procedures for procuring ADP, A&E, or Construction.

## INTRODUCTION

### PRESOLICITATION PHASE

Determination of Need	Initiating the Procurement	Analysis of Requirement	Sourcing
<b>Determining Needs</b> 1. Forecasting Requirements 2. Acquisition Planning	<b>Processing the PR</b> 3. Purchase Requests 4. Funding <b>Market Research</b> 5. Market Research	<b>Analyzing Requirements</b> 6. Specifications 7. Statements of Work 8. Services	<b>Extent of Competition</b> 9. Sources 10. Set-Asides 11. 8(a) Procurements 12. Competition Requirements 13. Unsolicited Proposals <b>Selection Factors</b> 14. Lease vs. Purchase 15. Price Related Factors 16. Technical Evaluation Factors <b>Method and Plan for the Procurement</b> 17. Method of Procurement 18. Procurement Planning

### SOLICITATION-AWARD PHASE

Solicitation	Evaluation—Sealed Bidding	Evaluation—Negotiation	Award
<b>Terms and Conditions</b> 19. Contract Types 20. Letter Contracts 21. Contract Financing 22. Use of Government Property and Supply Sources 23. Need For Bonds 24. Solicitation Preparation <b>Soliciting Offers</b> 25. Publicizing Proposed Procurements 26. Preaward Inquiries 27. Prebid/Preproposal Conferences 28. Amending Solicitations 29. Cancelling Solicitations	<b>Bid Evaluation</b> 30. Processing Bids 31. Bid Acceptance Periods 32. Late Offers 33. Bid Prices 34. Responsiveness	<b>Proposal Evaluation</b> 35. Processing Proposals 36. Technical Evaluation 37. Price Objectives 38. Cost and Pricing Data 39. Audits 40. Cost Analysis 41. Evaluating Other Terms and Conditions 42. Competitive Range <b>Discussions</b> 43. Factfinding 44. Negotiation Strategy 45. Conducting Negotiations	<b>Selection for Award</b> 46. Mistakes in Offers 47. Responsibility 48. Subcontracting Requirements 49. Preparing Awards <b>Executing Awards</b> 50. Award 51. Debriefing <b>Protests</b> 52. Protests <b>Fraud and Exclusion</b> 53. Fraud and Exclusion

*Exhibit I-1. Federal Acquisition Process Chart.*

**POST-AWARD ADMINISTRATION PHASE**

<b>Start-Up</b>	<b>Quality Assurance</b>	<b>Payment and Accounting</b>	<b>Closeout</b>
<b>Planning</b> 54. Contract Administration Planning 55. Post-Award Orientations  <b>Ordering</b> 56. Ordering Against Contracts and Agreements  <b>Subcontracting</b> 57. Consent to Sub-contracts	<b>Monitoring and Problem Solving</b> 58. Monitoring, Inspection, and Acceptance 59. Delays 60. Stop Work 61. Remedies  <b>Property</b> 62. Property Administration  <b>Reporting Performance Problems</b> 63. Reporting Performance Problems	<b>Payment</b> 64. Limitation of Costs 65. Payment 66. Unallowable Costs 67. Assignment of Claims 68. Collecting Contractor Debts 69. Progress Payments 70. Price and Fee Adjustments  <b>Accounting</b> 71. Accounting and Cost Estimating Systems 72. Cost Accounting Standards 73. Defective Pricing	<b>Closeout</b> 74. Closeout

**POST-AWARD ADMINISTRATION PHASE (Con't)**

<b>Contract Modification</b>	<b>Termination</b>	<b>Claims</b>	
<b>Modifications/Options</b> 75. Contract Modifications	<b>Termination</b> 76. Termination 77. Bonds	<b>Claims</b> 78. Claims	

*Exhibit I-1. Federal Acquisition Process Chart (continued)*

## INTRODUCTION

### OVERVIEW OF PROCUREMENT PLANNING

Duties	<p>The following duties are covered in this course:</p> <ul style="list-style-type: none"><li>• Reviewing Purchase Requests</li><li>• Determining if Funds are Available</li><li>• Conducting Market Research</li><li>• Critiquing Specifications</li><li>• Analyzing Requirements for Services</li><li>• Preparing Source Lists</li><li>• Using Set-aside and 8(a) Programs</li><li>• Obtaining Full and Open Competition</li><li>• Making Lease vs. Purchase Decisions</li><li>• Developing Evaluation Factors for Award</li><li>• Selecting Method of Procurement</li><li>• Preparing a Procurement Plan</li></ul>
Length	One weeks (5 days)
Daily Hours	8:00 to 4:30. The time from 3:30 to 4:30 is reserved for reading assignments and/or one on one questions with the instructor. You may leave at 3:30 if necessary, but you are expected to complete all reading assignments.
Who Should Attend	Contract Specialists (GS-5 to GS-7) who have successfully completed Introduction to Contracting.

## USING THE TEXT / REFERENCE IN THE CLASSROOM

Performance-Oriented	This Text/Reference and the related classroom materials are performance-oriented. The Text/Reference provides a step by step guide to performing the duties. In the classroom, you will have opportunities to practice performance of the duties - using the Text/Reference as your guide - through the use of such instructional techniques as interactive viewgraphs and case studies.
Interactive Viewgraphs	An interactive viewgraph is a slide on the overhead projector that requires a response from the class. For example, if the instructor is showing a decision table, the "then" side would be empty and you would help fill out the answers. Or perhaps the slide asks a particular question about a list of conditions shown on the slide. Most viewgraphs are represented in the Text/Reference as an Exhibit.
Case Studies	Case studies are written as scenarios or stories about particular procurement situations. There are several questions that follow the scenarios relating to the case and the particular lesson. Sometimes you have to use information in the Text/Reference to complete a case study.
Reading Assignments	There will be an in-class lesson for every chapter in this Text/Reference. You are responsible for assigned readings from the chapter. You will spend minimal time listening to lectures. Our philosophy is that you learn best by doing the tasks under simulated conditions.
Testing	There will be one, closed book written test. It will contain approximately 50 questions and will be administered on the last day of class. The test should take no more than 75 minutes. All test questions were developed to verify the learning acquired from the course learning objectives which appear on the second page of each chapter in the Text/Reference.

## USING THE TEXT / REFERENCE AT YOUR JOB SITE

Ease of Use	The Text/Reference was developed to be used at your job site as well as in the classroom. Its step by step approach, FAR references, structured writing, and index are all designed for the easy and quick retrieval of information about the contracting process. Each Text/Reference is "dated" by indicating which FAC of the FAR system it is current through. This lets you know <u>exactly</u> how up to date it is. You may contact the FAI for updates or annotate your own copy as FAR policy changes.
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## INTRODUCTION

### FAR References

Most FAR references are boxed and appear in the left column opposite related text. Where appropriate FAR references also appear in Exhibits.



Icons of file folders are placed in the left column opposite text indicating a need to document the contract file or opposite documents which must be placed in the contract file. The number on the icon corresponds to the suggested file numbering system in the FAR at §4.803(a) which many agencies have adopted. (See the following page for the complete list of items.)

The book has not yet been written that does not contain some typos, incorrect citations, missing information, or technical inaccuracies. If this book is helpful to you, and you would like to help make it better, please send any corrections you recommend to the FAI in care of GSA-VF, 18th and F Sts., NW, Washington, DC, 20405.

The training materials used in this course were developed by the Federal Acquisition Institute using the Macintosh II family of computers, Aldus PageMaker 4.0 for the Text/Reference, and Word 4.0 for the Class Exercises.

## CONTRACTING OFFICE CONTRACT FILE CHECKLIST

1. Purchase request & acquisition plan
2. Justifications & Approvals, and Determinations & Findings
3. Evidence of availability of funds
4. Synopsis in CBD
5. List of sources solicited and those denied solicitation
6. Set-aside decision
7. Government estimate of contract price
8. RFP and any amendments thereto
9. Security requirements and clearances
10. Each offer or quotation, the related abstract, and record of determinations concerning late offers
11. Contractor's contingent fee representation and other certifications and representations
12. Preaward survey reports
13. Source selection documentation
14. Contracting officer's determination of the contractor's responsibility
15. Small Business Administration Certificate of Competency
16. Records of contractor's compliance with labor policies including EEO policies
17. Cost or pricing data and Certificates of Current Cost or Pricing Data or a required waiver
18. Packaging and transportation data
19. Cost or price analysis
20. Audit reports or reasons for waiver
21. Record of negotiation
22. Justification for type of contract
23. Authority for deviations from regulations, statutory requirements, or other restrictions
24. Required approvals of award and evidence of legal review
25. Notice of award
26. Original signed contract or award; all contract modifications; and documents supporting modifications executed by the contracting office
27. Synopsis of award or reference thereto
28. Notice to unsuccessful quoters or offerors and record of any debriefing
29. Acquisition management reports
30. Bid, performance, payment, or other bond documents, or a reference thereto; notices to sureties
31. Report of postaward conference
32. Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award
33. Documents modifying normal assignment of contract administration duties and responsibility
34. Approvals or disapprovals of requests for waivers or deviations from contract requirements
35. Rejected engineering change proposals. These may be filed separately for early disposal
36. Royalty, invention, and copyright reports (including invention disclosures) or reference thereto
37. Contract completion documents
38. Documentation regarding termination actions for which the contracting office is responsible
39. Cross-references to pertinent documents that are filed elsewhere
40. Additional documents on which action was taken or that reflect actions pertinent to the contract
41. Chronological list of awarding and successor contracting officers including dates
42. All procurement integrity certifications
43. Record of all persons authorized to have access to proprietary or source selection information

# CHAPTER 1

## PURCHASE REQUESTS

### THE CASE OF THE (PARTIALLY) MISSING PR

*The contracting officer has just given you a purchase request (PR) for communications equipment and told you to review it prior to taking any procurement action. What do you look for?*

- *What are the elements of a PR?*
- *Are there any deficiencies or omissions?*
- *Whom do you contact to correct the PR?*

*This chapter will guide you through the review of the PR prior to accepting it. You will learn about*

- *meeting with the requiring activity,*
- *establishing a procurement administrative leadtime,*
- *setting up a contract file, and*
- *identifying procurement officials to whom information about pending requirements may be disclosed before issuing a solicitation.*



## COURSE LEARNING OBJECTIVES

At the completion of this chapter, you will be able to:

**Overall:** Accept the purchase request (PR) or return it to the requiring activity.  
Request additional information from the requiring activity where necessary to complete the PR.

**Individual:**

- 1.1 Identify omissions and deficiencies in a purchase request.
- 1.2 Advise requiring activity managers on deficiencies and explain what is needed.
- 1.3 Accept purchase request.
- 1.4 Establish a contract file on the accepted purchase request.
- 1.5 Identify procurement officials to whom information about pending requirements may be disclosed prior to issuance of the solicitation.
- 1.6 Control data on proposed acquisitions prior to solicitation.

# INTRODUCTION FOR PROCESSING PURCHASE REQUESTS

## What is a Purchase Request?

The purchase request is a document that describes needed supplies and/or services so that a procurement can be initiated. It is submitted by the requiring activity to the contracting office. The PR is the first item to be placed in the official contract file.

## Goals in Processing Purchase Requests.

Your primary goal is to accept an adequate purchase request having

- All appropriate signatures
- Proper funding and date funds expire
- Clear, definitive specifications, statement of work, or description of supplies/services
- Realistic delivery date
- Special instructions

Having an adequate PR will help ① avoid problems later on such as bid protests and contractor disputes, and ② assure timely delivery.

## Who is a Procurement Official?

FAR 3.104-4(h)

Procurement Official means

"any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement."

Knowing who is a procurement official is crucial in controlling data on proposed procurements.

## What is PALT?

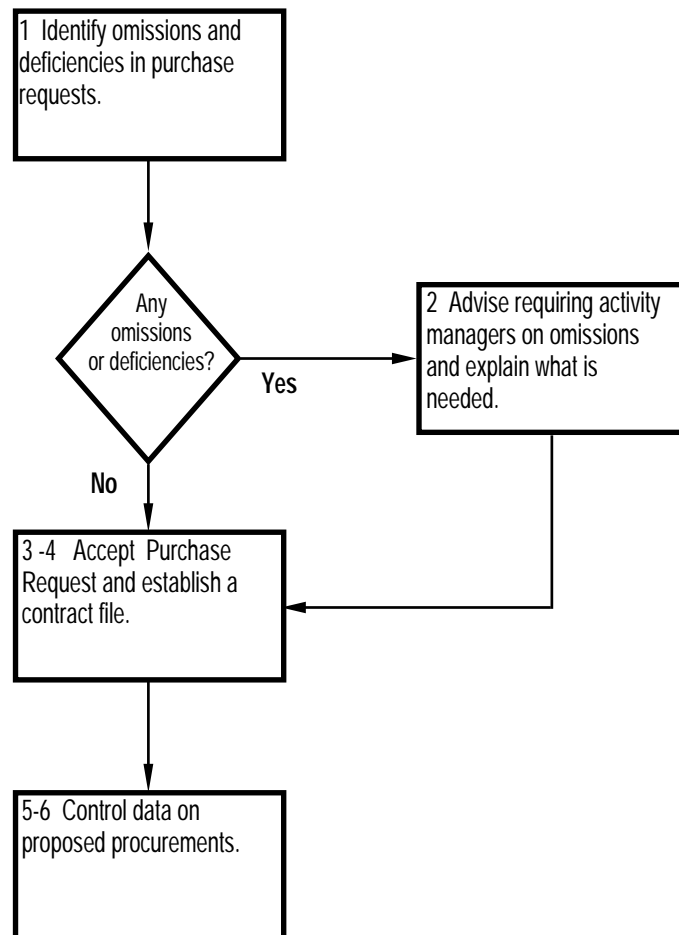
Procurement Administrative Lead Time is the number of days it takes the contract activity to award a contract from the date it accepts a Purchase Request from the requiring activity.

This first chapter is concerned with the processing of purchase requests. A more detailed description of each element in a PR is found throughout the remainder of this text reference.

## Steps in Performance

The steps in processing purchase requests are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN PROCESSING PURCHASE REQUESTS



## STEPS IN PROCESSING PURCHASE REQUESTS

<b>PR REVIEW CHECKLIST</b>	
<b>ELEMENTS OF PR</b>	<b>OMISSIONS</b>
Approvals & Reviews	
Funding	
Quantity	
Description	
Packaging/Marking	
Inspection/Acceptance	
Delivery/Shipment	
Contract Administration	
Special Provisions/Clauses	
Technical Evaluation Factors	
Sources	
Acquisition Plan	
<b><u>SIGNATURE</u></b>	<b><u>DATE</u></b>

Prior to accepting the PR, identify all omissions and any deficiencies that are apparent on the face of the PR. However, many deficiencies may defy detection prior to your acceptance of the PR. Such deficiencies only become evident after you have researched acquisition histories and market data as described in Chapter 4.

# TYPICAL OMISSIONS AND DEFICIENCIES

Page 1 of 4

Element	UCF	Typical Omissions	Action	
Approvals & Reviews	N/A	Missing one or more approvals or reviews required by agency policy.	Return PR to requiring activity.	
Funding	N/A	Did not cite both (a) Source of Funds and (b) amount of funds OR No supporting documentation for absence of a fund citation.	Return PR to requiring activity.	
Quantity	§B	No quantity specified OR No unit of issue specified OR No Independent Government Cost Estimate.	Obtain from requiring activity prior to accepting the PR.	
Description of Requirement	§C	Missing.	Return PR to requiring activity.	
Packaging & Marking	§D	Missing.	Identify the applicable clause(s) and instructions (e.g., FAR 52.247-29 through 44). Ask requiring activity if there are any special instructions.	
Inspection & Acceptance	§E	Missing name of person responsible for inspection and acceptance OR Did not specify place (origin or destination) of inspection/ acceptance OR Did not specify timing of inspection/acceptance.	Where necessary, obtain name(s), place(s), and/or time(s) from requiring activity.	
		No special acceptance criteria or testing procedures.	Identify the applicable clause(s), if any (e.g., FAR 52.246-2 or 246-4). Ask requiring activity if there are any special criteria or testing procedures.	

Note: **Element** refers to an element of the Purchase Request. **UCF** refers to the Uniform Contract Format, and this column lists the section of the UCF in which that element of the PR will be incorporated. **Chapter** refers to the Chapter of this text in which a deficiency is covered (omissions are covered only in this chapter).

# IN PURCHASE REQUESTS

Page 2 of 4

Typical Deficiencies	Action	Chapter
Need for additional justifications and/or waivers (based on analysis of other omissions and deficiencies).	Obtain prior to issuing the solicitation.	2-7
Wrong fund citation.  Funds are not realistic.	Obtain a corrected PR.	3
Quantities or units are not consistent with the requirement, as finally definitized.	Discuss problem with the requiring activity. Document discussions and enter the correct quantity and units in the solicitation.	5
Description is vague, ambiguous, overly restrictive, and/or insufficiently restrictive.	Discuss problem with the requiring activity. Document discussions and enter the description, as revised, in the solicitation.	5
Proposed packing and marking instructions are vague, ambiguous, overly restrictive, or inconsistent with the requirement. OR Special instructions are necessary, given the requirement (e.g., long storage time or overseas shipments)	Discuss problem with the requiring activity. Document discussions and enter special packing and marking instructions, if any, in the solicitation.	5
Proposed inspection and acceptance criteria or testing procedures are vague, ambiguous, overly restrictive, or inconsistent with the requirement. OR Special criteria or instructions are necessary, given the requirement	Discuss problem with the requiring activity. Document discussions and enter special inspection and acceptance criteria or testing procedures, if any, in the solicitation	5

# TYPICAL OMISSIONS AND DEFICIENCIES

Element	UCF	Typical Omissions	Action	
Delivery & Shipment	§F	No delivery date OR Delivery not shown as a calendar date (ASAP, Immediately, etc.) OR Shipping address or place of performance is missing, incomplete, vague, or ambiguous.	Identify the applicable standard clause(s), if any (e.g., FAR 52.212-1 or 212-2). Obtain missing data from requiring activity.	
Contract Administration	§G	No COR/COTR identified.	Obtain name(s) from requiring activity.	
		No special requirements.	Identify the applicable clause(s), if any (e.g., FAR 52.242-2). Ask requiring activity if there are any special contract administration requirements.	
Special Provisions & Clauses	§H-L	None identified.	Ask requiring activity if any are needed.	
Evaluation Factors	§M	None provided.	Ask requiring activity if award will be on “low price” (solely on the basis of price and price-related factors) or “best value” (on the basis of price and technical and business management factors).	
Sources	N/A	Only one source recommended OR Requests restricting competition to specified sources.	Question whether the requiring activity is requesting “other than full and open competition” or “full and open competition after the exclusion of sources.” If so, obtain the necessary justification.	
		No sources recommended Plan not provided.	Ask requiring activity if it knows of any sources.	
Acquisition Plan	N/A		If a formal acquisition plan is required pursuant to FAR Part 7 and agency supplemental regulations thereunder, proceed accordingly.	

Note: **Element** refers to an element of the Purchase Request. **UCF** refers to the Uniform Contract Format, and this column lists the section of the UCF in which that element of the PR will be incorporated. **Chapter** refers to the Chapter of this text in which a deficiency is covered (omissions are covered only in this chapter).

# IN PURCHASE REQUESTS

Page 4 of 4

Typical Deficiencies	Action	Chapter
Delivery date is not reasonable	Discuss problem with the requiring activity. Document discussions and enter the delivery date, as revised, in the solicitation.	5
Proposed special contract administration requirements are vague, ambiguous, overly restrictive, or are not consistent with the specification or statement of work OR Special contract administration procedures are necessary, given the requirement	Discuss problem with the requiring activity. Document discussions and enter the special contract administration requirements, as revised, in the solicitation.	5
Proposed provisions or clauses are inconsistent with requirement, vague, ambiguous, overly restrictive, or otherwise not applicable.	Independently determine the provisions and clauses to include in the solicitation.	See FAI <u>Sealed Bidding</u> Text Reference.
Proposed evaluation factors are not reliable or valid, given the specification or statement of work.	Discuss problem with the requiring activity. Document discussions and enter the evaluation factors, as revised, in the solicitation.	13
Proposed restrictions on competition are not valid.	Discuss problem with the requiring activity. Document discussions and determine whether or not to restrict competition.	11
Plan is not complete or is otherwise inadequate.	Discuss problem with requiring activity and obtain a revised plan, if any revisions are necessary.	N/A



## PURCHASE REQUESTS

### DELIVERY DILEMMA

*After reviewing the PR, you have found the following omissions/deficiencies:*

- *No indication of fiscal year in fund citation*
- *Quantity unclear*
- *Single source with no justification attached*
- *Purchase description is ambiguous*

*You have sent a memo to Eleanor Green of the requiring activity advising her of the omissions and asking her to call you. She returns your call and agrees to provide the missing data, but she now asks for a change to an earlier delivery schedule from the 12 months that appears on the PR to 6 months. She will send the request in writing along with the other info.*

*Which elements of the PR impact on delivery?*

*What will be the impact on PALT?*

*What will you tell Eleanor when you next talk with her?*

#### 1.2 Advise Requiring Activity

If, after reading the entire Purchase Request, you have detected one or more omissions or deficiencies, contact the requiring activity (RA).

- Do this even if the PR appears to be acceptable at this point and you only need to make clarifications, for your questions may cause the requiring activity to rethink the procurement and pull back the PR.
- If acceptance of the PR hinges on one or more corrections to it, make that point to the requiring activity.

Some omissions can only be corrected by returning the PR to the requiring activity for action (e.g., to obtain a necessary approval).

- Others may be corrected by you based on information from the requiring activity obtained by phone or in person.
- However, if you correct the PR, copy the corrected version and route it to the requiring activity for written acknowledgment of the changes.

Pending receipt of necessary documentation such as an approval or fund citation, the requiring activity's manager may persuasively argue that urgency does not brook delay on the part of the contracting office.

- If you decide to begin work on a PR that is not acceptable in its present form, document the file accordingly.



- Bear in mind, however, that valuable time and resources can be wasted on a PR that ultimately never becomes a solicitation.
- Also, do not release a solicitation or publish the CBD synopsis until the PR is fully acceptable.

In the final analysis, it is the contracting officer—not the requiring activity—that suffers if the Anti-Deficiency Act has been violated or if the contracting action has not been authorized or cleared by the proper officials.

### 1.3 Accept PR

After completing your review of the purchase request and correcting the omissions and apparent deficiencies, accept the purchase request by notifying the requiring activity:

- that the PR is acceptable;
- of the beginning date for PALT; and
- of the approximate award date.

### PALT

Procurement Administrative Lead Time (PALT) begins with acceptance of the PR and ends with contract award. Since the establishment of PALT will impose a time schedule on your procurement action, it is very important to be realistic in estimating an award date:

- Review previous similar procurements,
- Talk to other contract specialists, and
- Confer with the contracting officer to help you.

PALT is often used by contract managers to ① plan future procurement actions and ② measure performance of contract specialists.

### Contract Files

When you buy a book, you expect it to be complete. Imagine your frustration when you find three or four chapters are missing after reading half the book. After accepting the PR, you must establish a contract file which will be maintained for an agency prescribed period of time to ensure there will be no missing chapters. The contract file serves the following purposes:

FAR 4.801

- Accounts for your actions for every phase of the procurement.
- Provides rationale for decisionmaking.
- Demonstrates support for actions taken.
- Provides information for reviews and investigations.
- Serves as a source of data for analysis in future procurements.

The person that will use the contract file the most will be you, the contract specialist. A well organized file will save you more time than anyone else.

## PURCHASE REQUESTS

### FAR 4.802

Three types of files must be maintained:

1. A file for each contract, consisting of the:
  - contracting office contract file.
  - contract administration office contract file.
  - paying office contract file.
2. A file for cancelled solicitations.
3. A general contractor file tracking performance over many contracts.

### FAR 4.803

For the preaward portion of the contract file, there are 43 types of records to be placed in the contracting office contract file. Generally, these records cover the following:

- Purchase request.
- All documentation for the basis of the acquisition and award.
- Completed solicitations UCF Sections A, B, and K
- Assignment of contract administration functions.

The 43 elements are listed at the end of the Introduction to this text. Your agency may require additional contract file documentation.

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For the postaward portion of the contract file, there are 20 types of records to be placed in the contract administration office contract file. Generally, these records cover the following:

- Copy of the contract and any modifications, orders.
- Progress payments.
- Documentation of all actions taken to ensure performance.
- Termination.
- Contract completion.

Once again, your agency may require additional contract file documentation. Not all agencies or contract activities have a separate contract administration office. In this event, both preaward and postaward contract files would be maintained in the same office.

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Finally, there are 4 types of records to be placed in the paying office contract file:

### FAR 4.203

1. Copy of the contract including Taxpayer Identification Number (TIN) and any modifications.
2. Bills, invoices, vouchers.
3. Record of payments or receipts.
4. Other pertinent documents.

## DON'T CALL US, WE'LL CALL YOU

*Okay, you've just finished meeting with Eleanor and have obtained the missing PR information. In addition, you discussed the new delivery schedule and in particular have confirmed your understanding as to the following:*

- *quantity of equipment needed*
- *the purchase description*
- *need for technical evaluation factors, and*
- *sources of supply.*

*The communications equipment is available commercially, three additional sources were identified, and there will be no need for a technical evaluation. You conclude, therefore, that the new delivery schedule is feasible.*

*While preparing a short note to Eleanor accepting the PR, you receive a phone call from Mark Waters - a former co-worker who is now in the policy office. He wants to know if you have any requirements for communications equipment because he's been keeping his eye on the stock market for a neighbor who wishes to invest in a communications company.*

*What do you say?*

*What kinds of information can you divulge and to whom?*

### 1.4 Control Data

Inform potential offerors of the following:

- You cannot disclose information about future requirements.
- Generally, proposed contract actions are publicized 30 days prior to issuance of the solicitation.

#### FAR 3.104

You should talk about current or pending acquisitions on a need-to-know basis only. This applies to:

- Procurement officials
- Other Government personnel
- General Public

One exception is your Small Business Administration procurement center representative who is required to review proposed acquisitions and make determinations to "set-aside" procurements for small businesses.

Procurement requirements must be kept secure to prevent

- premature disclosure of information or
- disclosure of restricted information.

## PURCHASE REQUESTS

### FAR 15.404

You may, however, release some information to prospective offerors to generate more interest (i.e. competition). This is accomplished through the use of a

- Presolicitation Notice

A letter to potential sources providing information on the proposed procurement, requesting certain information from the sources, and whether there will be a presolicitation conference.

- Presolicitation Conference

A meeting held with potential sources to explain complicated specifications or aid the sources in preparing offers for submission.



The contract file should be documented with copies of any notices, list of attendees at the conference, and nature of information released or obtained.

## JUST SAY NO

*In the case mentioned earlier, you remind Mark of the prohibition against disclosing information about pending requirements. He immediately recalls that restriction and abruptly ends the conversation.*

*Meanwhile, you have received a Congressional Inquiry asking why this requirement was not limited to Innovations Technology Co., a small business. Your contracting officer wants to see you ASAP - are there special rules for Congress?*

Before issuance of the solicitation, you should review your agency regulations to determine if there are any restrictions you must observe regarding release of information. Generally, you are prohibited from disclosing the following:

### FAR 5.401

- Plans that would provide an undue or discriminatory advantage to private or personal interest.
- Confidential information received from an offeror.
- Information requiring protection under the Freedom of Information Act.

- Information pertaining to internal agency communications (e.g., technical reviews, contracting authority, or recommendations referring thereto).
- Proprietary data.
- Number of prospective sources that requested a copy of the solicitations.

### **BY THE BOOK**

*Your CO assists you in responding to the Congressional inquiry by directing you to FAR 5.403(a). Since your response would result in the disclosure of restricted information, your CO refers the proposed reply to the agency head through the legislative liaison office. The CO also advises you to document the file fully as you may never learn what information is actually provided!*

## PURCHASE REQUESTS

## NOTES

## CHAPTER 2

# FUNDING

### IS THE MONEY REAL?

*The funds on the PR you received today, September 17, will expire September 30. This is the end of the Fiscal Year and the money cannot be carried over to the next fiscal year. The requirement is for the exercise of an "evaluated" option to buy out leased Photorite copiers located at five air force bases. You have been administering this contract for the past three years. The PR is complete except there is no funding citation for the \$16.5 million estimate.*

*What do you need to do in terms of funding to make an award by September 30?*

*From whom do you get the funding citation?*

*Will there be sufficient funds to buy all the copiers?*



## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

**Overall:** Determine if funds are available to commit the Government on a contractual action before solicitation.

**Individual:**

- 2.1 Identify the type of funding available for the requirement.
- 2.2 Identify the date by which funds must be obligated.
- 2.3 Determine whether to return the purchase request for correction.
- 2.4 Determine whether the amount of funding is realistic.

## INTRODUCTION FOR FUNDING

**Funding of Contracts** Funding is a key element in every acquisition--without compensation there is no enforceable contract. The Constitution provides that congressional appropriations are the sole authority for the expenditure of federal funds. Appropriated funds cover a fiscal year beginning October 1 and ending September 30 of the following year. The expenditure of all types of appropriations and the operation of related accounts are controlled by statutes and regulations. A statute is a law enacted by the legislative branch of Government and signed by the President. The statute is identified by its public law number.

One of the most important statutes is the Anti-Deficiency Act of 1905, as amended, and if violated, could result in major penalties. Federal law also provides that appropriations shall be applied only to the supplies and services for which the appropriations were made except as otherwise provided by law.

### Definitions of Funding Terms

**Certification:** The finance office “certifies” that funds are available to cover proposed contracts.

**Commitment:** A “commitment” is an administrative reservation of funds against a future obligation on a contract, such as the earmarking of funds when the agency solicits an offer.

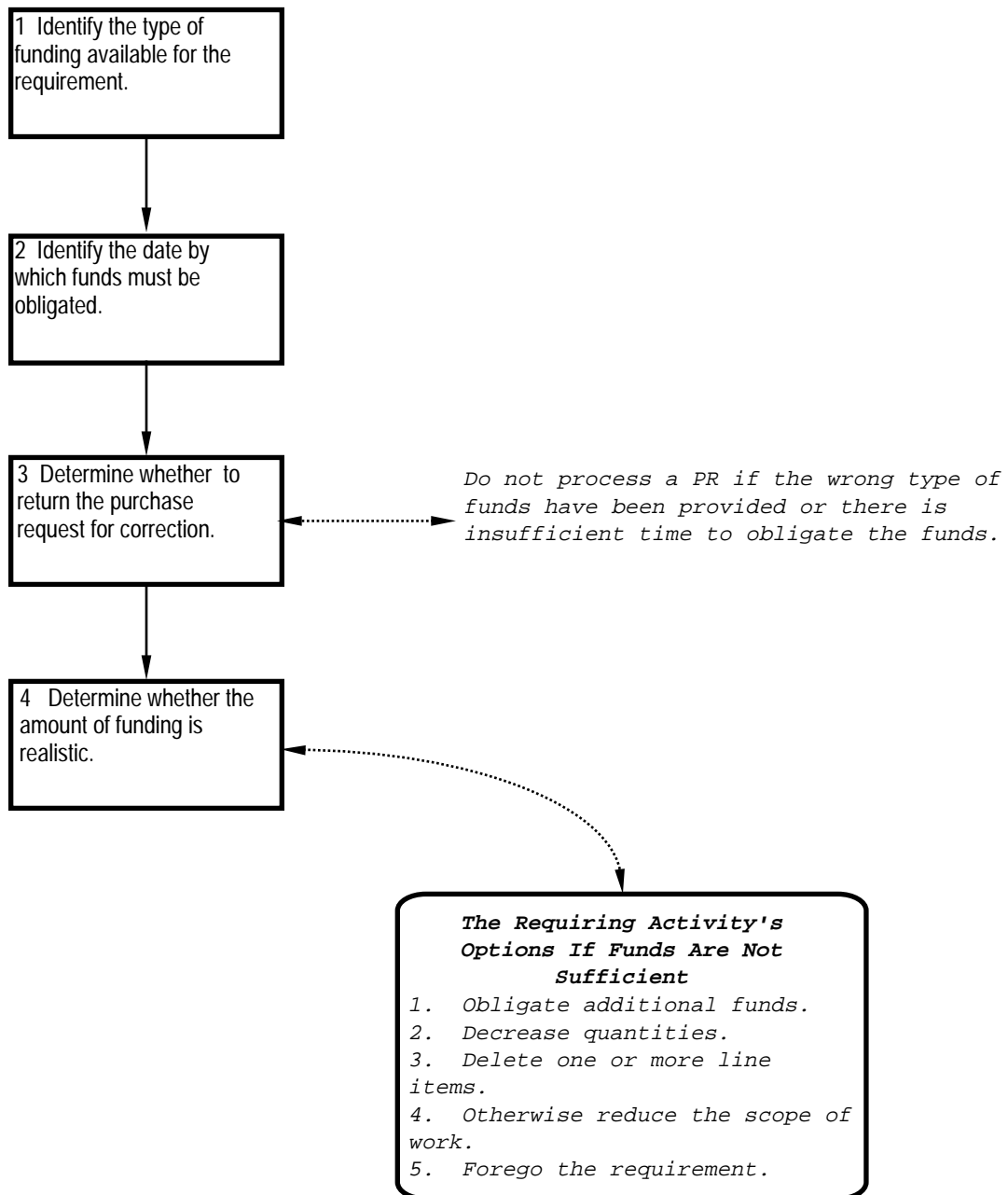
**Obligation:** An “obligation” is a Government liability resulting from a contract, purchase order, or similar documents.

**Expenditure:** An “expenditure” is payment to the contractor for delivery of supplies or services.

### Steps in Performance

The steps in reviewing the sufficiency of funds are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN REVIEWING THE SUFFICIENCY OF FUNDS



# STEPS IN REVIEWING THE SUFFICIENCY OF FUNDS

## 2.1 Identify Type of Funding

The three types of funding are listed in Exhibit 2-1.

TYPES OF FUNDING	
FAR 17.101	
Annual	Obligated only in the fiscal year for which the funds are appropriated.
Multi-year	Obligated for more than one fiscal year.
No year	Obligated in no specific year or years.

*Exhibit 2-1*

FAR 17.102-1(a)

"Specific statutory authority is needed by your agency to make financial commitments for amounts greater than those appropriated annually by the Congress."

### Obligation of Funds

Funds carried in an annual appropriations act are considered one year appropriations unless the act specifically provides otherwise.

1. If no or only partial obligations are made during the year(s) for which the money was appropriated, the appropriation expires and is no longer available for obligation.
2. The unused funds are returned to the Treasury unless there is specific authorization for reallocations.
3. Annual funds are provided by Congress for such things as
  - civilian pay,
  - maintenance and operation,
  - subsistence, and
  - normal items of supply that are deliverable within two years after the fiscal year ends. (However, the need for the supplies must be identified with the current year of obligation.)

Multi-year funds are provided for services or major systems/equipment.

- research and development
- weapons systems
- long lead time construction
- similar long range projects.

## FUNDING

### 2.2 Identify Funds Obligation Date

Determine ① the date by which funds must be obligated and ② if funds are likely to be available prior to award. Contracting Officers are constrained by the Anti-Deficiency Act which provides that:

**FAR 32.702**

"No Government officer or employee may authorize or create an obligation in excess of funds available or in advance of appropriations."

### Fund Citation

The fund citation applied to the requirement should identify the applicable fiscal year. An example of a fund citation for GSA would be:

GSA NEAR ACCOUNTING CLASSIFICATION					
Fund	Organization	Budget Activity	Object Class	Function	Cost Element
127.9	SOOP0920	10	21	H40	110

127.9 = GMA Fund[127.] for FY89 [9]  
SOOP0920 = Office of Acquisition Policy  
10 = Budget Activity  
21 = Object Class  
H40 = Function

Check your agency's funding citation scheme, as there is a great deal of variation from agency to agency.

In the event of a violation of the Anti-Deficiency Act, an officer or employee of the Government shall be subject to:

- suspension from duty without pay, or
  - removal from office, or
  - fined up to \$5000, and/or imprisoned up to 2 years
- depending upon the severity of the violation.

Contracting officers shall:

1. Not spend more money than he/she has;
2. Not promise to spend more money than he/she has;
3. Not spend money for purpose other than that authorized, and
4. Obtain written assurance from fiscal authority (usually provided on the PR) that adequate funds are available or condition the contract upon availability of funds as provided in Exhibit 2-2:

DECISION TABLE ON FUNDING CLAUSES	
IF...	THEN
A contract requires new fiscal year funds and action is initiated before funds are available:	Insert <b>Availability of Funds</b> clause (52.232-18) in solicitations and contracts.
If a one-year indefinite-quantity or requirements contract for services is expected and the contract: (a) is funded by annual appropriations and (b) is expected to extend beyond initial fiscal year	Insert <b>Availability of Funds for Next Fiscal Year</b> clause ( 52.232-19) in solicitations and contracts.
If a multiyear contract is contemplated	Insert <b>Limitation of Price and Contractor Obligations</b> (52.217-1) and <b>Cancellation of Items</b> (52.217-2) clauses in solicitations and contracts.

*Exhibit 2-2***Crossing Fiscal Years**

Contracts funded by annual appropriations cannot cross fiscal years except:

**FAR 32.703-3**

1. In accordance with statutory authorization, or
2. When contracts are for an end product that cannot be subdivided for separate performance in each fiscal year (e.g., advisory and assistance contracts).

If you receive a PR that includes a statement that funds will expire on a certain date, do not accept it until you have established that adequate time is available for award by this date. **Examples** of factors that impact this determination are:

- Justification for single or limited source(s) is satisfactory (if funds expire in a short period of time).
- Item to be purchased is commercially available or statement of work for services is standardized.
- Method of procurement.
- Synopsis time frames can be met.

## FUNDING

### IS THERE ENOUGH?

*In reference to the case discussed at the beginning of this chapter, you have met with the local Photorite sales representative, Ralph Lore, on several occasions and have developed a good working rapport. He informs you that Photorite is willing to discount the buyout price of the copiers an additional 30% if you award the contract by the end of the month.*

*He agrees to send you Photorite's current price list and a letter from Photorite offering the 30% discount.*

*Meanwhile, you have contacted Lynne Browngrove of the requiring activity, and she has provided you with the correct funding citation. The money is now real in the sense that the contracting officer can legally obligate its expenditure to a contractor for delivery of specified goods or services.*

*But do you have enough?*

### 2.3 Determine Whether to Return PR

Having investigated the type of funding and if there is sufficient time to award before funds expire, you must decide whether to proceed with the procurement or return the PR to the requiring activity. The requiring activity will generally want to know what its options are if the PR is returned. Exhibit 2-3 is a decision table covering some situations.

FUNDING DEFICIENCIES AND SOLUTIONS	
IF ...	THEN
No funds and/or citations:	Return PR to requiring activity.
No funds, but PR states they will be available prior to award:	Make assessment on likelihood of fund availability.
Fund citation is incorrect:	Obtain correction from requiring activity.
Wrong type of funds is cited:	Explain consequences of using wrong funds.
Funds will expire before award:	Explain to requiring activity your procurement constraints.
Funds are insufficient:	Explain options to requiring activity See Section 2.4.

Exhibit 2-3

Funding Deficiencies  
After Award

The consequences of awarding a contract with funding deficiencies are shown in Exhibit 2-4.

<b>CONSEQUENCES OF FUNDING DEFICIENCIES AFTER AWARD</b>	
<b>IF YOU AWARD A CONTRACT WITH:</b>	<b>THEN:</b>
Incorrect fund citation:	Modify contract to correct fund citation.
Wrong type of funds:	Modify contract to correct type.
Expired funds:	Anti-Deficiency Act has been violated, and Government has incurred liability to contractor for performance or delivery.
Insufficient funds:	Anti-Deficiency Act has been violated, and Government has incurred liability to contractor for performance or delivery.

*Exhibit 2-4*

### **MONEY PROBLEMS**

*The total offered price for the copiers is \$17 million. The PR is funded for only \$16.5 million! What do you do?*

*Can you get more money?*

*Can you eliminate some of the copiers from the buy?*

*You call back Lynne Browngrave at the requiring activity who says she will authorize the additional funds as soon as they are "certified." This is an administrative function of which you are unaware, and the individual who certifies the funds is out sick and no one knows when he will return!!! Today is September 20 and the clock has not stopped ticking.*



## FUNDING

### 2.4 Determine if Funding is Realistic

No year appropriations are provided for

The last item in Exhibit 2-3 concerns insufficient funds. After you have accepted the PR and begin the procurement process, you may realize that the estimated funds on the PR are not realistic based on the following:

- Recent awards for similar items or services
- Changes in market conditions, e.g., rapid inflation
- Limited competition
- Unusual nature of requirement
- Market survey of prices
- No domestic suppliers

If funds are not sufficient, you will need to meet with the requiring activity and review options with them, such as to:

- Obligate additional funds.
- Decrease quantities.
- Delete one or more line items.
- Otherwise reduce the scope of work.
- Provide for some of the requirement through options.
- Include a government right to terminate.
- Forego the requirement.



The requiring activity must make the final decision and then resubmit a revised PR.

## A CLOSING STATEMENT ON FUNDING

*Fortunately, the sick certifier returns to work on September 24, and the necessary funds are provided.*

*At the beginning of this chapter, we discussed a PR that was received 13 days before the funds were due to expire. Before accepting the PR, you had to obtain essential data. Having been successful in securing the necessary information, you can advise the CO to award the contract and not be in any violation of the Anti-Deficiency Act.*

# CHAPTER 3

## MARKET RESEARCH

### NEW TIRES FOR OLD

*You have received a requisition for tires, which describes the tires in terms that clearly come from the Sears Catalog. You have a number of questions about this requisition, including:*

- 1. In commercial buying, what price-related factors typically apply to the purchase of tires (e.g., treadwear, quantity discounts, etc.)?*
- 2. How is the tire market segmented (e.g., all-weather vs. snow; radial vs. non-radial, etc.)?*
- 3. What segment(s) of the market best match the requiring activity's real need? How should the requirement be worded to open the door to all competing products in that segment or segments, while closing the door to products in the wrong segments?*
- 4. Within each segment, how has each manufacturer differentiated its products? By price alone? By unique design characteristics? Are any of these unique design characteristics necessary for the Government's purposes? By services (e.g., tire balancing, front end alignment, and the like)? Are any of these services necessary for the Government's purposes and what is the trade-off between services and prices?*
- 5. What are the short-term pricing trends in the tire market? What are the current short-term risks to manufacturers in pricing their tires and how are they protecting themselves from those risks in their commercial sales?*
- 6. Is there a seasonal or cyclical pattern to tire prices?*
- 7. Are tire prices driven by demand or by costs? If driven by demand, what does it in fact cost to make a tire?*
- 8. What are the typical warranty and other terms and conditions of commercial sales (e.g., trade-in allowances, packaging, delivery, etc.)? How do these terms and conditions compare to the standard Government terms and conditions, in terms of impact on willingness to bid and on prices?*
- 9. What is the typical lead time for delivery in the commercial market and how does that compare to the requiring activity's drop dead date? If we need the tires in a hurry, who can supply tires against a tight schedule and what would be the trade-off between schedule and price?*
- 10. Who are the likely suppliers? What are their reputations?*
- 11. Are there 8(a) and small business suppliers?*
- 12. What has been the Government's track record in buying tires--pricing trends, experience with suppliers, problems with past procurements, and the like?*

## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

**Overall:** Obtain, collect and compile data from acquisition histories, other in-office sources, and additional sources, as appropriate.

**Individual:**

- 3.1 Research acquisition histories.
- 3.2 Identify and collect data from catalogs, periodicals, and other published or on-line sources.
- 3.3 Identify and collect any additional data necessary for decisions related to procurement.
- 3.4 Compile data.

# INTRODUCTION FOR MARKET RESEARCH

## Market Research Defined

FAR 11.004
------------

Market research means the process used for collecting and analyzing information about the entire market available to satisfy the minimum agency needs.

"Once the Government's needs have been functionally described, market research and analysis shall be conducted to

- ascertain the availability of commercial products to meet those needs,
- identify the market practices, including warranty terms of firms engaged in producing, distributing, and supporting these products, and ...
- ensure full and open competition and that the Government's needs are met in a cost effective manner."

The extent of market research and analysis should be commensurate with such factors as

- urgency,
- estimated dollar value,
- complexity, and
- past experience.

The collection and analysis of market information is fundamental to accomplishing many procurement tasks. (See Exhibit 3-5.)

## Market Survey Defined

FAR 7.101 and 102
-------------------

Market survey means

"attempts to ascertain whether other qualified sources capable of satisfying the Government's requirements exist."

Market surveys are conducted for all acquisitions in order to:

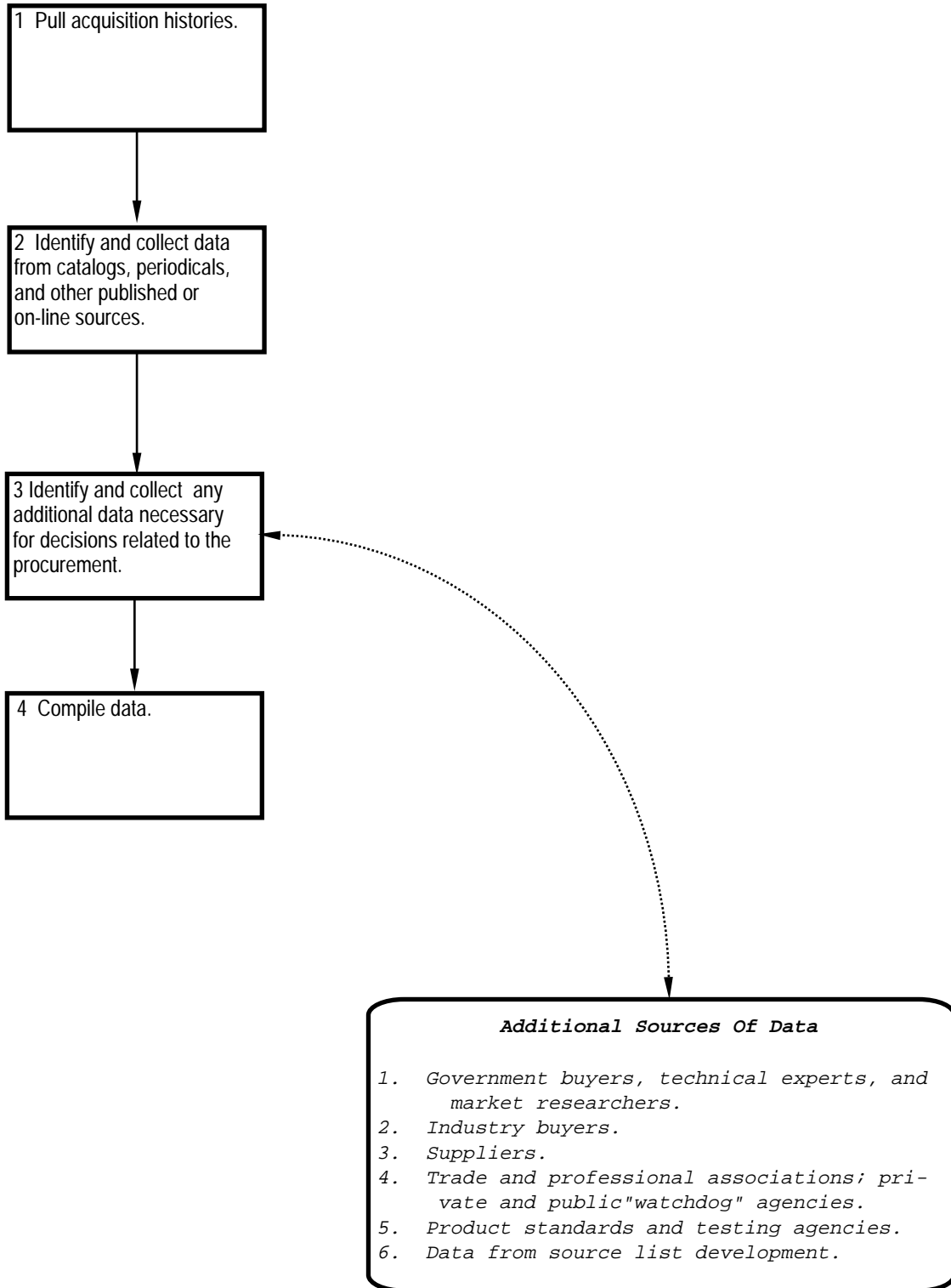
1. Promote and provide for full and open competition, or
2. Obtain adequate competition when full and open competition is not required.

The survey may or may not result in additional sources.

## Steps in Performance

The steps in conducting market research are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN CONDUCTING MARKET RESEARCH



## STEPS IN CONDUCTING MARKET RESEARCH

### 3.1 Research Acquisition Histories

As a contract specialist, it is your responsibility to conduct market research. The information you compile will be used throughout the entire procurement process.

It is a good idea to begin your market research by considering historical experiences encountered by your organization when purchasing similar supplies or services. You must:

FAR 7.103(k)

1. Analyze past acquisitions of the supplies or services;
2. Review a description of the supplies and a drawing or diagram when necessary; and
3. Contact other specialists in your organization who have experience in buying the same or similar items or services.

Acquisition histories are historical data of facts on a specific requirement that may include:

- Name of the contractor who received previous award
- Award date of the previous award
- Contract number
- Type of contract
- Description of supply/service
- Method of procurement used
- Award price
- Delivery terms
- Problems encountered before and after award
- Degree of competition

There may not be a separate document. You may need to read the entire contract file to acquire the data necessary to establish the history. Questions to ask when performing this step are listed below:

- How well did the product or service meet the needs of the requiring activity?
- What was the cost?
- Was the item competitive?
- What types of problems were encountered?
- What method was used to procure the requirement?
- What type of contract was used?
- Were there any unsolicited comments and complaints regarding previous procurements?
- What were the results of any synopses?

## MARKET RESEARCH

### 3.2 Collect Data: Routine Sources

Acquisition histories may not give you the whole picture you need for planning your procurement. Exhibit 3-1 lists the kinds of other market information you may need.

RESEARCH DATA
<ul style="list-style-type: none"><li>. Available products and services to meet the Government's minimum needs.</li><li>. Current and potential suppliers.</li><li>. Technological changes and trends in Government supply/demand.</li><li>. Technical capability.</li><li>. Derivation of prior price.</li><li>. Trends in buying practices, discounts, warranty practices, and other terms and conditions for commercial and Government sales.</li><li>. Potential cost of modifying a product.</li><li>. Factors that affect market prices.</li><li>. Production and/or delivery lead times.</li><li>. Quantity discounts.</li><li>. Problems with specifications and/or statements of work.</li><li>. Feedback from suppliers on previous contracts.</li><li>. Number of offerors and no bids.</li><li>. Problems, issues, and recommendations from award and administration of previous contracts.</li><li>. Trends in commercial and Government sales.</li></ul>

*Exhibit 3-1*

The contracting office's investment in market research must be considered from the perspective of the return it will bring.

**For example**, an organization that operates a simple purchasing function for common items and services needs only to acquire readily available common reference publications as shown in Exhibit 3-2.

An explanation of some of these references follows the Exhibit.

### DATA COLLECTION RESOURCES

Yellow pages	Commercial catalogs	Mandatory and optional schedules
Vendor files	Thomas Register	GSA Federal Supply Schedules
Tariffs	Public news media	Basic Ordering Agreements (BOA)
Trade journals	Census statistics	Procurement directories
CBD	Commodity indices	Other Federal agencies

Federal Procurement Data Center  
 Informational requests for quotations  
 Product brochures and promotional literature  
 Source lists for items of a similar nature maintained at contracting activities  
 Catalogs published by manufacturers, distributors, and dealers  
 Responses to advance notices and solicitation synopses published in the CBD  
 Economic indicators (Consumer Price Index, Producer Price Index)

#### *Exhibit 3-2*

Thomas Register - alphabetical listing of companies; addresses and phone numbers; product listing; description of products; and manufacturers of products.

FAR 4.801(b)(3)

Vendor files - suppliers; products; distributors; subcontractors; representatives of products; brochures; and past and present Government contracts.

Mandatory and optional schedules - products and services; suppliers; prices; contract period; and ordering information.

BOAs - name of contractor with whom agreement is made; description of supplies or services; methods for pricing and delivery; contracting offices authorized to issue orders; and future orders under the agreement.

Trade journals - address products; price information (i.e., trends in the immediate area, price escalations, etc.); Government needs vs. commercial needs.

Consumer Price Index - published monthly by the Bureau of Labor Statistics. The CPI provides a guide to changes in "retail" prices. It is used as a price adjustment factor in some areas of procurement (leasing in particular) and as a general gauge of inflation. However, the Producer Price Index is usually a better source of data on price trends for the Government, since the Government is usually a "wholesale" buyer.



## MARKET RESEARCH

Producer Price Index - published by the Bureau of Labor Statistics (BLS). It tracks changes in the prices which producers receive from the initial commercial purchasers of their products. It reflects the selling prices of selected manufacturers or the prices quoted on organized exchanges such as the Chicago Board of Trade. The prices are generally f.o.b. origin for immediate delivery.

### BLS Publications

BLS publications include:

#### **Producer Prices and Price Indexes**

Monthly report which includes CPI & PPI and average prices for selected commodities.

#### **Monthly Labor Review**

Articles on patterns and trends in producer prices.

#### **The BLS Industrial Price Program: A Survey of Users**

(Report 509, 1977)

#### **Producer Price Indexes: A Guide for Contracting Parties**

(Report 570, 1079)

### **3.3 Collect Data: Other Sources**

An organization that contracts for larger or more complex products and services will probably spend more resources on market research. Generally, the types of data compiled from acquisition histories and the common reference resources will not be sufficient when:

- Requirement has not been previously purchased
- The market is changing rapidly.
- New technology may be available.
- Sources are unknown.

You must collect additional data when needed to identify qualified sources that can provide your minimum requirements in a timely manner and at a reasonable cost.

### Federal Agencies

**FAR 5.405**

Other Government officials are an excellent source for obtaining information on products, contractors, specifications, and costs, especially for a supply/service that your contracting office has never procured. They will tell you the pitfalls before you begin processing the procurement. The old saying "why re-invent the wheel" expresses this sentiment. Some of the ways to locate these valuable resources are:

- Read the CBD notices and GAO decisions.
- Keep a list of other students that attend classes.
- Contact GSA for help in lease vs. purchase decisions.
- Ask your co-workers (they may have worked in other agencies).
- Contact SBA offices.
- Utilize Competition Advocates.

**FAR 7.403**

## State and Local Governments

Often state and local governments have experience procuring certain supplies/services before the Federal Government. The requisitioner may even have borrowed an idea from a state or local government when planning the requirement. Always check with the requisitioner for any points of contact when the requirement is new to your organization.

Contacting state or local governments can be handled through a formal market survey. Any information you need to help you make the best decisions should be included on the survey. The actual questions will vary with each survey.

Exhibit 3-3 is a sample buyer market survey.

BUYER MARKET SURVEY	
<u>Name of Contracting Activity</u>	
Request your agency complete this survey and return it by <u>Date</u> to:	
<u>Name of Specialist</u>	
<u>Address</u>	
<u>Phone No.</u>	
1. What do you currently use to meet your needs?	
2. Who are your suppliers?	
3. What is the cost?	
4. What is the normal delivery time?	
5. Was performance satisfactory? If not, give reason.	
6. Is the product commercial? If not, explain.	
7. What type of discounts does supplier offer, if any?	
8. What are supplier's warranty terms, if any?	
9. Any additional charge for special packing and packaging?	
10. Are there any recommendations?	

*Exhibit 3-3*

## MARKET RESEARCH

### Industry

Another group to consider is the actual customers of prospective contractors. A wealth of information can be obtained regarding:

- how well a contractor performs;
- the reliability and quality of the product or service;
- the cost they may have paid;
- delivery terms and conditions; and
- warranty provisions.

Obtaining data from prospective contractors will provide you with information you cannot obtain elsewhere. The actual suppliers are the only sources for determining:

- Current trends in the market place.
- Feasibility of requirement in terms of complexity and timeliness.
- If the requirement is restrictive in any way.
- Alternative solutions.
- Interchangeable parts.
- Warranty or Delivery terms.
- Amount of interest in the procurement.
- Pricing patterns.
- What commercial distribution systems are available
- Complaints over previous procurements.

FAR 11.007

You can also conduct market surveys with the industry that supplies the requirement. Unlike surveys to other buyers, you should focus your questions on the areas illustrated in the sample industry market survey (Exhibit 3-4).

You may find there is not enough time to conduct a formal survey. Contacting these sources by telephone is an acceptable alternative. In fact, many suppliers will not complete survey forms for fear of the possibility that confidential information will be made public.

You may consider doing both when you discover many suppliers did not respond to the written request. Prepare questions to ask before you call.

Locating the sources to survey can be found through:

- Solicitation mailing list.
- Market surveys from the buyers and users.
- Responses to presolicitation notices.
- Unsolicited comments and complaints from suppliers.

INDUSTRY MARKET SURVEY	
<u>Name of Company</u>	
Request this survey be completed and returned by [ <u>    Date    </u> ] to:	
<u>Contact Point</u>	
<u>Address</u>	
<u>Phone No.</u>	
1.	What type of products do you offer for this requirement?
2.	Did you have difficulty with previous specifications?
3.	Do you offer this requirement commercially?
4.	Is there a better method of soliciting for this requirement?
5.	Are the products still available?
6.	Have the products been changed? If so, how often?
7.	What type of discounts do you offer your customers?
8.	What are your warranty terms, if any?
9.	Any additional charge for special packing and packaging?
10.	Do you have a commercial catalog?
11.	What is your average delivery lead time?
12.	Is there an alternative product that would meet the same need?

*Exhibit 3-4***Presolicitation Notice**

Presolicitation notices (See Section 4.2.7) are published in the CBD and used when there is only one known source or there is no known source. These notices encourage participation from untapped suppliers. If new sources are found, they should be discussed with the requiring activity. Any suppliers responding to a presolicitation notice should be included in the market survey.

## MARKET RESEARCH

### Trade Associations

Trade and professional associations can be most helpful in locating sources and providing

- general information regarding their industry,
- extensive list of members, or
- answers to questions concerning trends, pending legislation, and problem areas

that individual suppliers may not provide.

Examples of some associations are:

Better Business Bureau  
Chamber of Commerce  
Builders & Contractors Exchange  
National Contract Management Association  
Small Business Referral Inc.

You should consider any nonprofit product standards and testing organizations. The Technical Association of the Pulp and Paper Industry (TAPPI) is an example of a testing organization. Your technical advisors are the best source for locating any product standards and testing organizations.

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Effective market research enables you to shape a procurement package to fit market conditions and encourage responses from the sources most capable of meeting the requirement. Market data is directly applied to the procurement tasks illustrated in Exhibit 3-5.

### **PROCUREMENT TASKS APPLICABLE TO MARKET DATA**

- .Identify additional qualified sources.
- .Analyze validity of cost estimate.
- .Prepare negotiation objectives.
- .Prepare solicitation.
- .Select contract type.
- .Select method of procurement.
- .Identify special requirements (e.g., warranties, options, multiyear contracting).
- .Analyze specification for restrictions.
- .Select methods of publicizing and realistic time for responses.
- .Identify evaluation criteria.
- .Prepare contract administration plan.
- .Select packaging, packing and marking requirements.
- .Identify price-related factors.
- .Select quality assurance requirements.
- .Select delivery/shipment requirements.

*Exhibit 3-5*

As there are benefits to market research, there are consequences from the lack thereof. Circumstances, effects, and remedies are shown in Exhibit 3-6.

<b>CONSEQUENCES FROM LACK OF MARKET RESEARCH</b>		
<b>CONDITION</b>	<b>LIKELY EFFECTS</b>	<b>REMEDIES</b>
Defective or non-commercial specifications	Eliminate qualified sources; Higher prices; amendments or cancellation of solicitation	Improve planning; screen requirements more stringently
Procurement from wrong segment of market	Limited sources or only one source; higher prices	Improve planning; check acquisition history; ask requiring activity
Noncompliance with publicizing requirements	Insufficient notice to prospective sources; bid protests; limited responses to solicitations; inadequate data on market conditions	Comply fully with requirements for publicizing; increase use of presolicitation notices
Inappropriate type of contract	Higher prices; reduce competition; contract administration problems	Conduct industry briefings on proposed requirements
Lack of consideration of price-related factors	Higher prices; hidden costs;	Consider price fluctuations (e.g., seasonal, cyclical, lease vs. purchase, transportation)
Unrealistic delivery/performance	Eliminate qualified sources; limited responses to solicitations; unnecessarily high prices	Obtain realistic delivery from qualified sources; discuss with requiring activity for approval
Inappropriate method of procurement	Limited responses to solicitations; higher prices; limited sources proposed	Conduct industry briefings on requirement; check acquisition history
Invalid selection criteria	Improper contract award decisions; unnecessarily high prices; unacceptable product;	Improve screening of selection criteria; cost/benefit analysis if higher prices are paid for reasons of technical superiority
Inappropriate QA requirements	Higher prices; omitted requirements; unnecessary delays in delivery	Involve QA, COTR, and end user; screen previous contract file
Inappropriate delivery/shipment requirements	Improper storage; misdirected deliveries; excessive delays; void warranties; claims	Involve transportation specialist; Ask prospective suppliers
Inappropriate packaging, packing, and marking	Higher prices; damaged goods; reshipping costs	Develop checklist; involve packaging specialist

*Exhibit 3-6*

Exhibit 3-7 illustrates techniques to use in compiling data necessary for making the best decisions when planning the procurement.

## MARKET RESEARCH

<b>MARKET RESEARCH TECHNIQUES, APPLICATIONS, AND IMPACTS</b>		
TECHNIQUE	APPLICATION	IMPACT
1. Investigate the market. Determine current status of technology, extent of commercial applications, and source availability.	Buyers where rapid technological changes influence the way the requirement is stated.	Market indicators influence the specifications and the contracting approach (e.g., multi-year, options, type of contract). Significant savings by adapting commercial items.
2. Brief industry. Conduct widely publicized briefings on future requirements to gain interest and to solicit comments on planned approach.	Seek out new companies.	Acquire information that will affect the specification development and contracting approach.
3. Contact potential contractors to discuss requirements and get recommendations about planned acquisitions.	All buys.	Enhanced requirements definition, solicitation development, and competition.
4. Visit potential sources. Target qualified potential sources who typically do not respond to solicitations.	Where history suggests that responses may be insufficient.	Identify and encourage new and possibly better qualified sources to submit offers.
5. Attend industry and scientific conferences.	Key personnel who need to keep abreast of new developments, industry trends, and make contacts.	Knowledge of current technology and commercial successes and failures as applied to agency requirements.
6. Acquire literature about commercial products, industry trends, product availability, reliability, and prices.	All requirements.	More sources to solicit. Affects how requirements are stated; facilitates price analysis; identifies new products.
7. Analyze procurement history by examining quality and extent of competition, prices, and performance results.	All buys.	Revise requirements, specifications, and contracting approach based on "lessons learned."
8. Evaluate and test commercial items fully, as appropriate.	Whenever seemingly artificial barriers to the use of commercial items exist.	Develop data about the performance of commercial items. Determine necessary adaptations and develop cost estimates.
9. Advertise in trade journals and other publications to solicit inquiries.	Any buy where competition is limited and CBD announcements are not reaching potential sources.	More responses from new and perhaps better sources.
10. Use the CBD, provide complete data and synopses far in advance of a solicitation.	All nonexempt procurements over \$25,000.	More inquiries and responses. Sufficient time to receive expressions of interest about a requirement and alert potential contractors to the release of a solicitation.

*Exhibit 3-7*

11. Determine why selected contractors do not respond to a solicitation.	All procurements where responses are insufficient or apparently well-qualified sources do not respond.	Identify the impediments to effective competition. Document and publicize "lessons learned."
12. Examine business and trade association directories.	All buys.	Identify additional sources to solicit and acquire basic information about these sources.
13. Use Federal Procurement Data System information.	All buys where an insufficient number of sources are responding. (E.g., you can search the FPDS for the SIC codes for your product and obtain a printout of contractors who have previously supplied it.)	Identify current Government contractors, what was purchased, and if the purchase was competitive. Information about past procurements, of the same or similar supplies or products services.
14. Examine Federal Supply Schedule.	All requirements that might be satisfied by commercially available products or services.	Identify products or services on schedules at a favorable price and terms.
15. Contact the agency small business advisor to assist in locating qualified small & minority suppliers.	All requirements.	Identify qualified small & minority businesses for inclusion in a bidder's list.

*Exhibit 3-7 (cont..)*



## MARKET RESEARCH

### 3.4 Compile Data

Your research should concentrate on issues that encourage competition, quality, and reliability to meet the Government's needs in the most economical and timely manner.

Questions and considerations to be addressed in assembling market data follow. The listing is not intended to be exhaustive but is presented as a guide to key topics.

Type of Product

#### **Is the product a basic commodity for which established trading organizations exist?**

Raw materials, foods, and other staples are often sold on established exchanges for which excellent market data exists. This information may be of primary importance for bulk purchases.

FAR 11.006

#### **Is the product a general-purpose consumer or commercial item for which major retail and wholesale markets exist?**

Products may be generally sold at established catalog prices. Depending on the dollar value of purchase, the appropriate retail or wholesale catalogs may be indicators of what constitutes a fair market price.

Publications such as Producer Prices and Price Indexes, and even Consumer Reports may provide important information on price/quality issues.

A competitive market may reasonably be expected. The primary source of data may be the offers themselves.

Type of Market

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#### **Is the market/economy stable or fluctuating?**

In a stable market, historical data are very useful because adequate competition is more likely to have existed and the changes in relative values of prices are fewer, thus reducing the complexity of the analysis.

In an inflationary market, government price indexes are important to determine reasonable escalation.

In technologically advancing markets, trade journals and user-oriented publications are important to alert the buyer to product improvements and price decreases caused by product obsolescence.

In markets threatened by foreign competition, the contracting officer may refer to market surveys, trade journals, and informational quotes to learn of price decreases caused by competitive pressure.

**Is the market broad-based or does it tend toward monopoly?**

The existence of many sources reduces the need for data from other sources (published data, Government indexes, etc.), as competition should drive price to the lowest level.

Few sources or a single source mandates careful analysis of price, using all available data.

Agency Expertise

Failure of sources to respond in a broad market may indicate a problem with specifications. An independent technical review may be required.

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**Is the product within the requisitioner's area of expertise?**

If the requisitioner/user repeatedly buys in a given market, confidence in the Government estimate can reasonably increase.

If the agency is buying outside its mission or for a new mission, more market/product/price analysis is required from the contracting activity.

Time of Purchase

If the agency is buying outside its mission or for a new mission, outside technical assistance and use of other agency experience is indicated.

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**What is the time of the purchase?**

Market data from published sources may indicate a potential for counter cyclical buying (buying when demand is down and supply is up).

Trade journals and other publications may indicate unusual price increases caused by brand name popularity, indicating a need for caution in pricing and perhaps a need for identifying non-brand name sources.

Government indexes, market surveys, and trade journals may forecast price changes and thus indicate a buying strategy of either stocking up to hedge against shortages or delaying purchase until a price decreases.

## MARKET RESEARCH

## NOTES

# CHAPTER 4

## SPECIFICATIONS & STATEMENTS OF WORK

### ARE ALL AIR CONDITIONERS CREATED EQUAL?

*You have received a PR to buy 28 “Freeman” air conditioners or air conditioners equal to the Freeman. The salient characteristics described in the purchase description are too restrictive--specific dimensions, btus and voltage. The estimated cost is \$130,000 and delivery is 100 days after award. You and your CO will meet with the requiring activity this afternoon.*

*What type of purchase description is this?*

*What impact does the purchase description have on delivery?*

*What recommendations will you offer concerning the purchase description?*

*This chapter will guide you through the review of specifications and statements of work (SOWs). You will learn how to critique specifications and SOWs, and advise the requiring activity on how to yield the maximum competition through developing effective specifications.*

## **COURSE LEARNING OBJECTIVES**

At the completion of this course, you should be able to:

**Overall:** Critique the specification or statements of work and related elements of the purchase request.

**Individual:**

### **REVIEWING SPECIFICATIONS**

- 4.1.1 Review acquisition histories and market research.
- 4.1.2 Determine if an existing FEDSPEC or MILSPEC is applicable.
- 4.1.3 Identify problems in using specifications "as is."
- 4.1.4 Critique proposed purchase descriptions.
- 4.1.5 Critique related elements of the purchase request.
- 4.1.6 Advise requiring activity and obtain justifications for any restrictions.
- 4.1.7 Determine whether to incorporate the specifications by reference.

### **REVIEWING STATEMENTS OF WORK**

- 4.2.1 Review acquisition histories and market research.
- 4.2.2 Critique related elements of the purchase request.
- 4.2.3 Advise requiring activity and obtain any needed changes.
- 4.2.4 Select and implement techniques to test and improve the SOW.
- 4.2.5 Obtain final SOW.

# INTRODUCTION FOR REVIEWING SPECIFICATIONS

## Description of the Requirement

The heart of the purchase request is the description . It identifies what must be delivered or accomplished. The description will also be the heart of the contract when it is awarded.

Providing an adequate description of needs is one of the most important duties of the technical personnel:

- Clarity and explicitness of the description can enhance the quality of the offers submitted and reduce problems.
- Clear and precise requirements allow the Government to establish conclusive baselines on which sound proposal evaluation criteria can be structured.
- Delays, administrative effort, and the chances of protests by unsuccessful offerors can, therefore, be reduced.

## Definitions

FAR 10.001

A product description is the generic term for documents used for acquisition and management purposes. Types of documents include:

federal or military specifications,  
federal or military standards,  
commercial item descriptions,  
purchase descriptions  
voluntary standards

A purchase description is a description of the essential physical characteristics and functions required to meet the Government's minimum needs.

## Policy

FAR 10.002

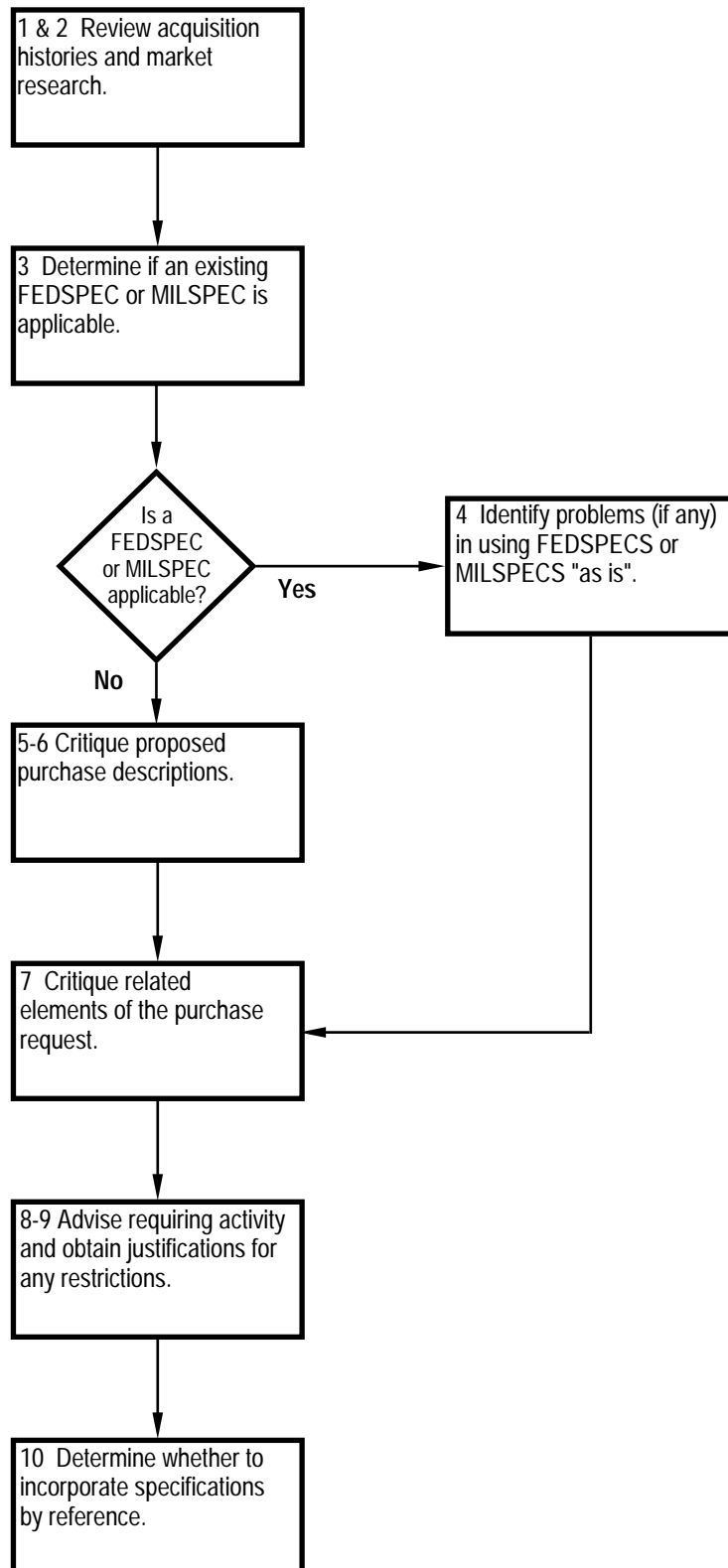
Regarding preparation for the acquisition of supplies and services, agencies shall develop specifications/purchase descriptions that:

1. Promote full and open competition,
2. Meet the minimum needs of the Government,
3. Include restrictive conditions only to the extent necessary,
4. Use functional or performance oriented specifications rather than design specifications, whenever practicable.

## Steps in Reviewing Specifications

The steps in reviewing specifications are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN REVIEWING SPECIFICATIONS



# STEPS IN REVIEWING SPECIFICATIONS

## 4.1 REVIEWING SPECIFICATIONS

### 4.1.1 Review Acquisition Histories and Market Research

The types of information you must consider when reviewing the Government's description of its needs are:

- Product description being used
- Problems encountered with competition and performance.

There are basically five different types of product descriptions:

- specifications,
- standards,
- commercial item descriptions,
- purchase descriptions, or
- voluntary standards

#### Specifications

A description of the technical requirement requirements for a material product or service that includes the criteria for determining whether these requirements are met. Specifications shall:

1. State only actual minimum needs of the Government, and
2. Be designed to promote full and open competition.

Specifications can be written in different ways:

**Design:** Specifies exact dimensions, materials, composition, physical and chemical requirements and other details of the product to be provided (or the service to be performed).

**Performance:** Expresses requirements in the form of output, function, or operation of a commodity.

**Functional:** States only end result to be achieved.

#### Standards

A document that establishes engineering and technical limitations and applications of items, materials, processes, methods, designs, and engineering practices including criteria deemed essential to achieve the highest practical degree of uniformity in materials or products or interchangeability of parts used in those products. Standards may be used in other product descriptions.

#### Voluntary Standards

A standard established by the private sector body and available for public use. Voluntary standards do not include private standards of individual firms.



## SPECIFICATIONS

Commercial Item Descriptions      An indexed, simplified product description that describes (by functional or performance characteristics) the available, acceptable commercial product that will satisfy the Government's needs.

Purchase Descriptions      A description of the essential physical characteristics and functions required to meet the Government's minimum needs. ("Brand name or equal description" is one type of a purchase description.)

### **Identify problems encountered with previous product descriptions**

The best way to locate the information needed for analyzing the description is through market research and reviewing acquisition histories. You need to consider the actual problems encountered when using these specifications:

**FAR 10.009**

1. Reviewing acquisition histories can identify the type of product description used for similar requirements and whether
  - full and open competition was promoted, and if
  - contractor(s) performed satisfactorily.

2. Market research can indicate

what the user thinks as to whether the specification for a similar procurement was adequate for meeting their needs in terms of:

- quality                      • quantity
- reliability                  • timeliness

and how industry views the usefulness of the specification:

- as a commercial item description for use by suppliers, or
- to secure products needed to meet the requirement.

You should also keep up with trends in technology and obtain feedback on existing specifications with respect to:

- Restrictive characteristics
- Nonessential preferences
- Obsolescence
- Weaknesses

Looking at these areas will help you identify any data that can be used in selecting, improving, or developing the Government's description.

### **4.1.2 Use Existing Federal or Military Product Descriptions**

There are many specifications, standards, and commercial item descriptions available for use by the Government. (See Exhibit 4-1.)

SPECIFICATIONS, STANDARDS, CIDS		
Specification	Description	Example
Federal (FEDSPEC)	Materials, products or services used or expected to be used by at least two federal agencies (at least one of which is civilian) and managed by GSA.	QQ C 493 Procurement group. 1st letter of name. Serial no. assigned by GSA. QQ-C-493 is a FEDSPEC for copper.
Interim Federal	Can be prepared and issued by a single activity such as a command of the Army, or a component of the National Security Agency; identified same as FEDSPEC except that two zeros precede the Arabic numeral.	GGG-C-0091 (NAVY-SH) is an interim FEDSPEC prepared by Navy Ship Engineering Center, Dept. of Navy
Military (MILSPEC)	Materials, products, or services that are military peculiar in nature; prepared and used by DOD; identified by "MIL" followed by the first letter of the first word in the title of the document.	MIL-F-3690 for engineering lubricating oil filter
Limited Coordination (MILSPEC)	Can be issued by one of the military departments to cover items peculiar to their needs or to satisfy an immediate acquisition need where no applicable specification exists; identified same as fully coordinated specifications except that the symbol designation of the preparing activity is added as a suffix to the Arabic numeral.	MIL-P-11062(WC), prepared by Weapons Command
Standards and	Established measures of quality, or requirements for materials, engineering practices, performance, design, or operation; identified by prefix "MIL- STD" or sheet form MS Drawings."	MIL-STD-790D, Reliability Assurance Program for Electronic Parts Specifications
Commercial Item Description (CID)	Represents physical/functional characteristics of a commercial or commercial-type product identified by the non-significant "A-A" prefix.	A-A50452, Life Preserver, Vest, Adult or Child

Exhibit 4-1

## SPECIFICATIONS

### Order of Preference

There is an order of preference established for using product descriptions meeting the needs of the Government and not inconsistent with any law:

1. Voluntary standards
2. Commercial Item Descriptions
3. Government "functional" specifications
4. Government "design" specifications

### Indices of Specifications and Standards

Federal product descriptions are specifications, standards, and commercial item descriptions prepared, issued, maintained and controlled by the Administrator of the General Services Administration (GSA) for use by all federal agencies. GSA publishes the federal product descriptions in the GSA Index of Federal Specifications, Standards, and Commercial Item Descriptions.

Military product descriptions are specifications and standards **unique to DOD** prepared, issued, maintained, and controlled by the Secretary of Defense. DOD publishes the military product descriptions in the Department of Defense Index of Specifications and Standards (DODISS).

All agencies including DOD are required to use any specification, standard, commercial item description, or other product description listed in the GSA Index. (Published military product descriptions in the DODISS are mandatory only on DOD procurements.)

The published Federal product description must be used unless:

FAR 10.006

1. Need is urgent and using the indexed product description would delay fulfilling the need.
2. Using small purchase/simplified procedures.
3. Products acquired and used overseas.
4. Items acquired for authorized resale, excluding military clothing.
5. National leading industry or technical source specifications or standards are available for construction or new installation equipment..
6. An adequate and appropriate voluntary standard is known to exist but has not yet been adopted and listed in the indexes for product and services.

Generally, the requiring activity will have selected the specifications applicable to their requirement. Also, they will have followed the

ordering/using instructions on the specification. The requiring activity should document their specification requirements on the purchase request. You are responsible for verifying the adequacy of the specification requirements.

#### Revised Editions

**FIRST, is the current edition of specification being used?** Before using any later editions, the requiring activity must be given an opportunity to concur with its use. You cannot cite an out-of-date specification in your solicitation.

Any revision will be indicated by either a numerical or alpha sequencing system. All editions will have either a revision indicator or supersession data. When citing the specification, it is important to indicate the date of the specification.

**Examples** of how revised editions appear on the specification are:

Revisions to FEDSPECS are indicated by A, B, C, etc., used consecutively for each successive issuance of a FEDSPECS.

Example: PP-T-101A  
20 August 1988  
SUPERSEDING  
Int. Fed. Spec PP-T-00101 (GSA-FSS)  
14 April 1980

[A new FEDSPECS that initially was issued as an Interim FEDSPECS.]  
Revisions to MILSPECS are indicated by A, B, C, etc., used consecutively for each successive issuance, except the letters I, O, Q, and S are not used.

Example: MIL-C-17C  
1 December 1983  
SUPERSEDING  
MIL-C-17B  
27 December 1976

#### User Instructions

**SECOND, is the requiring activity correctly following the instructions for using that specification?**

Read the specification to determine if there are any specific user instructions. For example, the specification may require you to specify a size, color or other design characteristic from a list of choices. Check to make sure the requiring activity complied with any user instructions.

## SPECIFICATIONS

### 4.1.3 Identify Problems in Using Specifications "As Is"

Evaluating whether or not a specification adequately describes the user's requirement will require you to review the individual sections, paragraphs, and even sentences. Your review may reveal problems such as are indicated in Exhibit 4-2.

PROBLEMS IN USING SPECIFICATIONS		
PROBLEM	DESCRIPTION	EXAMPLE
Inapplicable sections.	Technically obsolete.	All manufacturers offer fuel injection; therefore, section on carburetors is obsolete.
Restrictive sections.	Limits competition.	Later model motor vehicles.
Omitted features.	Specification does not meet minimum need as defined by requiring activity.	Requiring activity needs self feeder on copier because manpower not available to feed manually.
Failed to exclude products or services that do not meet need.	Minimally acceptable but does not perform at a satisfactory level.	The specification indicates that 10,000 btus is sufficient to cool a specific size room, and it does not.
Excluded products or services that can meet minimum need at a better price.	Specification restricts items of a different design.	Specification describes design of a BETA video recorder and any VHS product would not be acceptable under the specification.

*Exhibit 4-2*

Having identified problems with the specification, one remedy you can use is to make a deviation from a specification in order to yield the best market response in terms of:

- Competition
- Timeliness
- Minimum Functional Need.
- Quality
- Price

#### Changing a published specification

Each agency has designated an official with the responsibility to

- establish agency procedures for authorizing all deviations to existing specifications, and
- make notification of deviations or recommendations for change in any Federal specification to GSA, FCM, Washington, DC 20406.

At a minimum, a notification is required for major deviations such as those that will result in the introduction of a new item of supply.

You cannot repeatedly use the same deviation except when:

- GSA has been notified and has allowed the continuous use of a specific deviation, or
- Formal change to the specification is pending with GSA.

Deviation from military specifications must be in accordance with DOD regulations.

Even when a deviation is authorized, the final specification must:

- Be the most efficient and economical type of specification,
- Exclude all products or services that cannot meet the actual minimum functional need,
- Encompass all available products or services that can meet the actual minimum functional need,
- Be stated in terms that the market can satisfy, and
- Use metric system of measurement unless it harms U.S. firms.

#### 4.1.4 Critique Purchase Descriptions

If you have determined that the established specification or standard cannot be used **or modified** through an authorized deviation, a purchase description may be developed by individual activities and agencies for unique or repetitive acquisitions. The RA has the responsibility to develop the purchase description and attach it to the purchase request. You are responsible for determining its acceptability.

Reviewing the PD is critical when it has not as yet been tested in the market place through its use in a previous procurement. Once a purchase description has been issued in a solicitation, interested parties have had an opportunity to identify a restrictive, impractical or otherwise unacceptable requirement. The more competitive the previous procurement the more reliable the description becomes.

## SPECIFICATIONS

### Types of Purchase Descriptions

There are two different types of purchase descriptions: regular and brand name (including brand name or equal).

#### Regular

Regular purchase descriptions are descriptions that have been developed by the requiring activity to describe their requirement. A purchase description should describe the essential physical characteristics and functions.

#### FAR 10.004(b)

Purchase descriptions shall not be written so as to specify a product or a particular feature of a product peculiar to one manufacturer. If the description does include any specificity, the RA will have to be able to demonstrate that particular feature is essential to their requirements and other companies' products would not meet their minimum needs. This holds true whether the RA has identified the specific source or developed the description to only one source's specifications.

#### Brand Name or Equal

At a minimum, when a specific product is the basis for any or all of the description, the purchase description should identify the requirement by use of the actual brand name followed by the words "or equal". However, it is preferable to provide a more detailed description if time exists. Using a brand name to describe your requirement without the "or equal" is considered a restrictive specification and must be fully supported by the requiring activity.

#### Elements of a Purchase Description

Minimally acceptable purchase description (regular or brand name) should consist of the following elements:

1. Identification of an item known to meet the minimum needs of the Government by reference to manufacturer's name and catalog or model number;
2. A list of the salient physical, functional, or other characteristics of the product: characteristics which are essential to meet the needs of the Government; and
3. A list of all other items, by manufacturer's name and catalog or model number, which are known to meet the requirements.

Brand name or equal should only be used to purchase standard, off the shelf items for which a detailed description is not available.

**Restrictive or Impractical Requirements**

Brand name only is not the only way a requirement can be restrictive. Descriptions are restrictive when they include any requirement that would limit competition. Descriptions must be written in terms that are necessary to provide the Government with assurances their needs will be met.

A description is considered unduly restrictive when it has included a requirement that:

- limits competition but serves no other purpose
  - description includes a design requirement that is unnecessary for performance
  - geographic restrictions without a sound basis
- does not relate to the needs of the government,
  - description requires the "Cadillac" model when the needs of the Government can be met with a "Chevy"
  - features of the requirement are now obsolete

Any requirements written around a particular product or service are also considered unduly restrictive. This situation can occur when the requiring activity does not research the market thoroughly and uses the specifications for a product/service that has proven to be satisfactory in the past. Unless you are knowledgeable in the field, you may not be able to distinguish restrictive elements in a description.

**Testing a Purchase Description**

The acceptability may only be determined after using the purchase description in a competitive procurement. Prospective offerors who would be excluded will have an opportunity to challenge the use of the restrictive requirement. Unless you can demonstrate the requirement as written is considered necessary to assure the Government their basic needs, you will have to accept any challenges received.

The requiring activity should provide adequate justification to support any restrictive feature (including features that go beyond what would meet the minimum needs of the Government) and should be attached to the purchase request. When evaluating the purchase description identify restrictive elements and:

- obtain adequate justification from the requiring activity, or
- require the requiring activity to delete or rephrase the restrictive feature



## SPECIFICATIONS

### **Ambiguous or Vague Terms**

There cannot be legal competition unless bidders are competing on a common basis. All offerors and evaluators of offers must know what the contract will require of the the contractor. Otherwise, offerors may be able to submit an offer as they choose and the Government could not reject the offer as unacceptable.

When more than one interpretation can be made of any or all parts of the specification, offerors may not be able to:

1. formulate an offer that meets your needs
2. receive a fair evaluation of their offer
3. have the product or service accepted upon delivery or performance

When two different and reasonable interpretations can be made, the decision of which one is correct will almost always go against the drafter of the specification. When the problem was so obvious, the offeror should have requested clarification (patent ambiguities) and the decision would go against the offeror. It is very difficult for the Government to demonstrate patent ambiguities. Therefore, it is up to the Government to critique their purchase descriptions for determining if it was written clearly, accurately, and completely.

### **Unclear Division of Responsibilities Between Parties**

You must be able to determine who will be responsible for what. Since offerors will include costs associated with their responsibilities in their offers, the description must clearly identify all of their duties and responsibilities. Otherwise, the evaluation of the offers received may not be on a common basis. The Government, as the drafter, may be held responsible for any requirement that was intended for the contractor.

Exhibit 4-4 is a checklist you can use to help determine the adequacy of the purchase description. Obtain any missing information from the requiring activity.

<b>CHECKLIST TO DETERMINE ADEQUACY OF PURCHASE DESCRIPTION</b>			
	<b>YES</b>	<b>NO</b>	<b>N/A</b>
1. Is the requirement completely described in a language that can be understood by all parties?			
2. Is the proper type of purchase description used? (CID, brand name or equal, or regular purchase description)			
3. Is there a copy of the catalog referenced? (If not applicable, skip to next question)			
4. Is the requirement adequately described without over specification?			
5. Are justifications provided for any restrictions identified in the requirement? (Skip to next question if no restrictions apply)			
6. Does the requirement adequately address access to a Government facility or use Government Furnished Property when the contractor will be required to perform on site or use GFP? (Skip this question if not applicable)			
7. Is the delivery schedule reasonable enough to permit more offerors or allow small businesses an opportunity to respond?			
8. Does the description account for all the problems identified in the Market Report (or Acquisition Histories and Market Research)?			
<b>Comments</b>			

*Exhibit 4-4*

## SPECIFICATIONS

Spending time to critique the effectiveness of a purchase description when first received will help avoid problems later when time is less available. Problems identified later in the acquisition also can result in additional costs to the Government that may have been avoided had the purchase description been critiqued.

In order for you to be able to adequately critique the purchase description, it may be necessary for you to obtain pictures, drawings, diagrams, or other graphic representation of the requirement. When critiquing a purchase description, particular care must be given in the following areas:

1. Type of specification (design, performance, functional).
2. Type of purchase description (regular or brand name).
3. Restrictive or impractical requirements.
4. Nonessential or obsolete requirements.
5. Ambiguous or vague terms.
6. Unclear division of responsibilities between parties.

When reviewing the description of the requirement, you should consider whether or not

- used or reconditioned material,
- former Government surplus property, or
- residual inventory

would be acceptable.

### Used or Reconditioned Materials

**FAR 10.010**

Unless the specification states they can be used, the supplier must provide only new or recycled materials. Since a cost savings would be realized, it is in the Government's best interest to authorize use of these other materials. However, the following areas should be considered:

1. Safety of persons or property.
2. Total cost to the Government.
3. Performance requirements.
4. Availability and cost of new materials and components.

**FAR 23.401(b)**

You are also required to ensure that the specification or purchase description has not excluded the use of recovered materials by requiring items to be manufactured from virgin materials. Recovered materials are materials that have been collected or recovered from solid waste. Use of recovered materials should be allowed to the maximum extent without jeopardizing the reliability and quality of the product.

### 4.1.5 Critique Related Elements of the PR

There are other related areas of the purchase request (See Exhibit 4-5) that should be reviewed and challenged if a change would improve the

CRITIQUING PR ELEMENTS RELATED TO SPECIFICATION		
1. <u>Packaging, Packing, Preservation, and Marking</u>	YES	NO
Are there any special requirements that would improve the market's response to the Government's actual minimum functional need?		
Are packaging and marking instructions adequate for the requirement and in accordance with agency procedures?		
2. <u>Inspection and Acceptance Criteria and Requirements</u>		
Are contract quality requirements commensurate with the service or supply as determined by the technical description, its complexity, and the criticality of its application?		
Are testing procedures appropriate?		
Has the individual responsible for acceptance of the product/service been identified, and do you know when or where inspection will be?		
3. <u>Delivery/Shipment Requirements</u>		
Are delivery or performance schedules realistic, and do they meet the requirements of the acquisition?		
Will delivery or performance schedules encourage small business participation to the extent consistent with the actual requirements of the Government?		
Have evaluation criteria regarding delivery or performance been provided in the solicitation in order to notify offerors?		
Are multiple delivery times acceptable?		
Is there more than one place of delivery, and have they been adequately identified?		
4. <u>Contract Administration Requirements</u>		
Has a contract administration office been identified?		
Are written procedures complete and consistent with specification?		
Does the requirement call for a COR and has one been so identified?		
Have the responsibilities of the COR been delineated?		
Have invoicing procedures been included and has the paying office been designated?		

Exhibit 4-5

## SPECIFICATIONS

solicitation's ability to yield the best market response in terms of competition, quality, timeliness, price, and the actual minimum functional need. In addition, you should check the impact on any of these areas whenever you are otherwise recommending changes to the specification.

Where the requiring activity has failed to provide a recommendation (e.g., on packaging requirements), suggest any special requirements that would improve the market's response to the Government's actual minimum functional need.

Ensure that delivery and performance schedules will encourage small business participation to the maximum practical extent.

### **4.1.6 Advise Requiring Activity**

You are now prepared to discuss your recommendations with the requiring activity:

1. Changes that have an impact on the technical capabilities or delivery requirements must be acceptable to the requiring activity before you can proceed with the procurement.
2. Changes for statutory requirements generally are settled with a simple notification of the change sent to the requiring activity.
3. Other times you will need to negotiate an agreement. Keep in mind the requiring activity does not understand procurement regulations.

If the requiring activity has limited or restricted the specification, they will be required to provide written justification to you. You cannot continue with a procurement when you know it has unjustified restrictions. If discussions with the requiring activity are at an impasse, you will need to present your recommendations to the contracting officer or next higher level.

Document all actions pertaining to the specifications as well as all contract actions.

#### 4.1.7 Incorporate the Specifications by Reference

Once you have reached agreement on all issues, determine whether to incorporate the specification by reference.

Agencies will not normally furnish cited specifications (FEDSPEC, MILSPEC, Standards, etc.) with the solicitation unless:

- Product is complex.
- Time is inadequate for offerors to obtain specification and prepare an offer.
- Prospective contractor requests a copy of the specification.
- Purchase description has been developed.

### THE "PR" IS NOT ALL THAT CLEAR

*While reviewing the PR described in Chapter 1, you discover that the inspection and acceptance criteria are not sufficiently specific of location and methodology and that some of the required tasks are not adequately described. You call the Requiring Activity and talk to the Project Manager to obtain clarification. He states that he has provided all the information that he has available in the PR and would appreciate any help from you to make the SOW adequate.*

*What would your recommendations be concerning the inspection and acceptance criteria?*

*If the Project Manager couldn't come up with enough information to describe the required tasks more clearly, where and to whom could you go to test and improve the statement of work?*

## INTRODUCTION FOR SOWs

### Policy

Agencies in specifying needs in the RFP shall:

FAR 10.002

- Ensure that requirements are stated in terms of design, function, or performance;
- Develop specifications and purchase descriptions using market research in a manner designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired; and,
- Not include restrictive provisions or conditions except to the extent necessary to satisfy minimum needs or as authorized by law.

### Purpose

The statement of work (SOW) is that part of the Request For Proposals (RFP) or of the resulting contract that:

- Describes the system, item or objective to be developed or produced (i.e., the work to be done);
- Sets forth the methods by which the Government determines that its requirements are to be met; and,
- Identifies the technical and management data to be delivered under the contract.

If the work statement does not present exactly what is wanted, or does not state it well, it could generate many contract management problems for both the Contracting Officer and the Requiring Activity.

### Impact

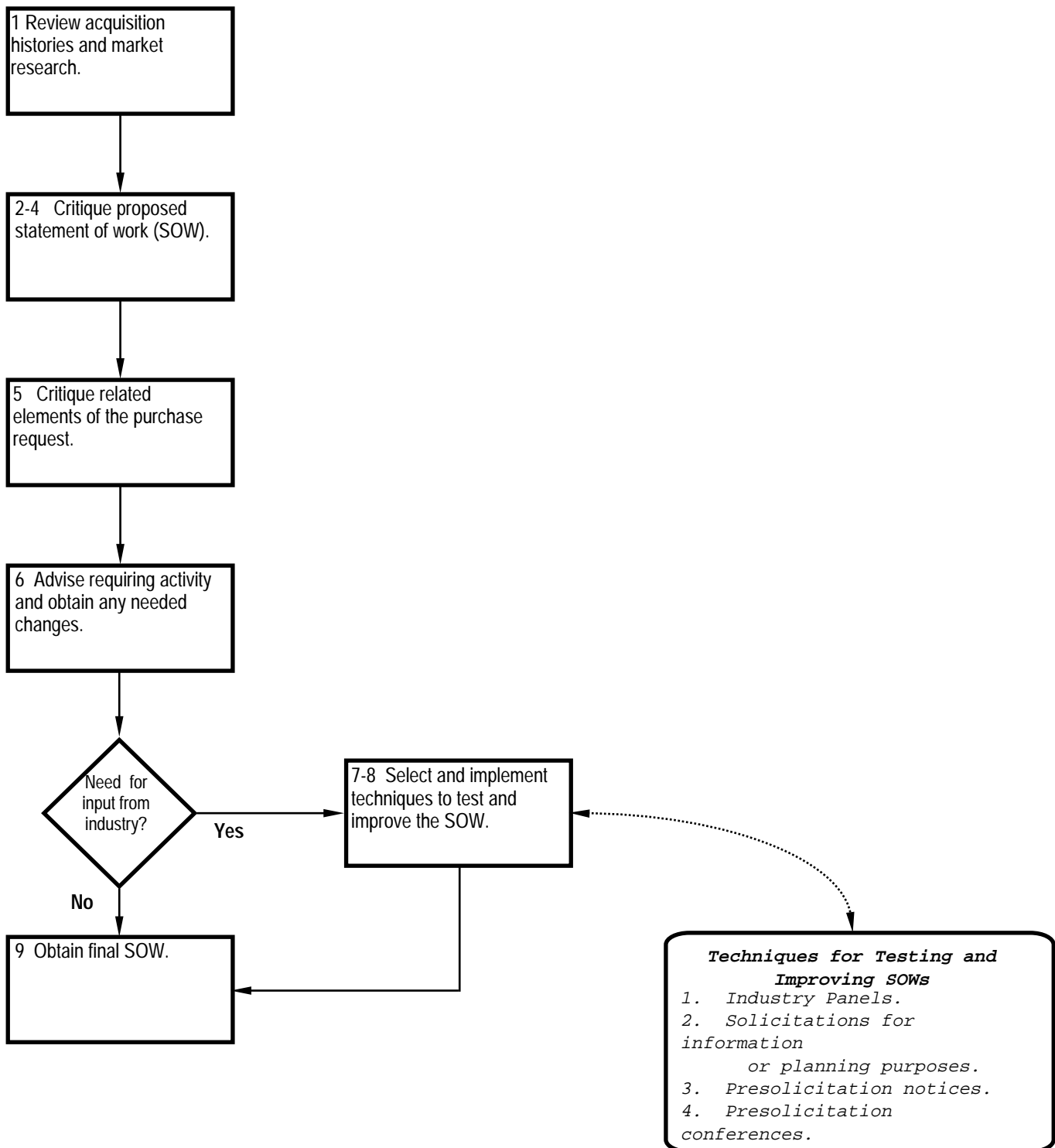
There are many areas that the SOW impacts:

- Extent of competition
- Source selection factors
- Type of contract
- Contractor's effort
- Number and size of "Changes"
- Performance measurement

### Steps in Performance

The steps in reviewing the SOW are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN REVIEWING STATEMENTS OF WORK





## STEPS IN REVIEWING SOWs

### 4.2 REVIEWING SOWs

#### 4.2.1 Review Acquisition History and Market Research

Part of your responsibility as a contract specialist is to develop a procurement plan and conduct market research. By doing so, you compile a valuable source of information which you can use to evaluate a SOW in terms of the market's capability. Exhibit 4-6 lists the kinds of market information that will assist you in developing recommendations for improvement in the Government's requirement to yield the best market response.

MARKET DATA
<ul style="list-style-type: none"> <li>• Available products and services to meet the minimum functional needs.</li> <li>• Current and potential suppliers.</li> <li>• Trends in supply/demand.</li> <li>• Factors that affect market prices.</li> <li>• SOW used by Government and industrial buyers.</li> <li>• Problems, issues, and recommendations from award and administration of previous contracts.</li> <li>• Feedback from suppliers on previous contracts.</li> <li>• Private sector practices in acquiring goods/services for similar requirements.</li> </ul>

*Exhibit 4-6*

#### 4.2.2 Critique Proposed SOW

Although it is the requiring activity's responsibility to draft the SOW, it is essential for you to understand what you are buying in order to negotiate costs, terms, and conditions. Formats for work statements vary widely, but they should always describe:

- Scope/Background/Objectives
- Contractor tasks
- Contract end items

You should always ask and have answered the who, what, when, how, and where in the SOW and related aspect of the PR as illustrated in Exhibit 4-7.

**WHO IS RESPONSIBLE? WHAT IS REQUIRED? WHEN IS IT  
REQUIRED? HOW IS IT TO BE DONE? WHERE IS IT  
ACCOMPLISHED OR NEEDED?**

**ELEMENTS OF A SOW**

**SCOPE/BACKGROUND/OBJECTIVE:**

- Scope: Should reveal a quick overview of what the SOW covers.
- Background: If applicable, a brief description of the problem(s) to be solved or the need giving rise to this requirement.
- Objective: The overall effect this requirement will achieve.

**CONTRACTOR TASKS:** Defines and explains the work to be performed.

- Main steps the contractor will complete and the sequence in which the work will be performed.
- Level of effort (if applicable).
- Reference to related studies, documentation, and specifications.
- Design/functional/performance characteristics (e.g., common nomenclature, kind of material, electrical data, dimensions, size, capacity, principles of operation, restrictive conditions, and intended use).
- Quality assurance requirements.
- Support equipment for contract end items.
- Government/contractor furnished property, facilities, equipment services required.

**CONTRACT END ITEMS:** Provides requirements related to the product or service deliverable.

- Inspection and acceptance criteria
- Data requirements (reports, technical data, etc.)
- Packing, packaging, and marking requirements
- Delivery schedules or period of performance
- Contract administration functions
- Other data pertinent to requirement(s)

*Exhibit 4-7*

## SPECIFICATIONS

The SOW is often read and interpreted by persons of varied backgrounds, such as lawyers, engineers, cost estimators, production and quality control specialists, inspectors, and contract managers. Therefore, the SOW must be stated such that ① more than one interpretation is impossible and that the ② prospective offeror has no doubt as to what must be accomplished.

Now that you have familiarized yourself with the various elements of a SOW, you should screen each area carefully to identify any inadequacies. Examples of inadequacies that can occur in SOWs are illustrated in Exhibit 4-8.

INADEQUACIES IN SOWs
<ul style="list-style-type: none"><li>• Ambiguous or vague terms.</li><li>• Unclear division of responsibilities between parties.</li><li>• Restrictive or impractical requirements (in terms of the market's capabilities).</li><li>• Omissions.</li><li>• Too weak to screen out products or services that do not meet minimum needs.</li><li>• Wrong type of specification (functional, performance, design).</li><li>• Improper format.</li><li>• Nonessential or obsolete requirements.</li></ul>

*Exhibit 4-8*

Exhibit 4-9 is a checklist for determining if a SOW is adequate. Ensure that the responses to the checklist are to your satisfaction before proceeding any further.

Your agency guidelines and procedures should also be considered when reviewing a SOW.

Responses to the checklist should be recorded to assist you in preparing your recommendations for additions, deletions, or changes to the requiring activity.

<b>CHECKLIST FOR DETERMINING SOW ADEQUACY</b>	
	COMMENT
1. Is the requirement clearly described as design, function or performance and in a language that can be understood by all parties?	
2. If background, other introductory information, or referenced documents are to be included, are they relevant and distinguishable from the contract objective and the contract tasks?	
3. Are the task descriptions, technical evaluation criteria, and proposal instructions adequate for proposal preparation?	
4. Is the SOW sufficiently specific to permit the Government and the contractor to make a list of manpower and resources needed and to estimate costs?	
5. Are specific duties of the contractor stated in such a way that he/she knows what is required?	
6. Is the requirement over-specified? It should specify only the results required and let the contractor find the best method of attainment. Are included special clauses reasonable?	
7. Are any FED/MIL specifications or exhibits applicable? If so, are they properly cited with latest available revision?	
8. Are all the obligations of the Government carefully delineated (i.e., approval actions, documentation, etc.)?	
9. Does the SOW sole source work?	
10. Will the contractor require access to a Government facility or use Government Furnished Property?	
11. Have management requirements (e.g., PERT charts) and schedules for reporting been enumerated, and are they excessive?	
12. Will the Project Manager or Contracting Officer's Representative who monitors performance and signs the acceptance report be able to tell whether the contractor has complied?	

## SPECIFICATIONS

	COMMENT
13. Would progress payments or incremental invoicing and/or payment be applicable?	
14. If Inspection and Acceptance procedures are too lenient or too vague, would First Article testing be appropriate?	
15. Are delivery/performance schedules too restrictive? Would relaxing the schedule permit more offerors or allow small businesses an opportunity to respond?	
16. Is there specific direction as to how the contractor's progress will be monitored (i.e., site inspection, progress reports, etc.)?	

*Exhibit 4-9*

Used, Reconditioned,  
Surplus, or Residual  
Inventory

While you have been critiquing the SOW to determine adequacy, you may have become aware of material that will be needed to perform the requirement.

**FAR 10.010**

"Generally, all contractually furnished supplies and their components, including former Government property, will be new, including recycled materials. However, agencies may acquire used or reconditioned material, former Government surplus property, or residual inventory conforming to the solicitation's requirements if the contracting officer determines that it is acceptable. When such a determination is made, the solicitation shall clearly identify the supplies or their components that need not be new along with the necessary details on their acceptability."

You must ensure that the prices paid for such items are reasonable. When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

**4.2.3 Critique Related Elements of the PR**

The steps in critiquing the specifications of related PR elements in Exhibit 4-5 may also be considered in critiquing the SOW of related PR elements.

It is now your responsibility to **communicate with the requiring activity** on:

- Adequacy of the SOW to communicate minimum needs.
- Product capability.
- Product failures and deficiencies from past history records.
- Suggestions for correcting the SOW.

**4.2.4 Advise Requiring Activity of Problems**

There are **several approaches** to use when discussing the SOW with the requiring activity:

- Ask leading questions (how?, who?, what?, where?, when?).
- Play devil's advocate (Would all the contractors approach this proposal the same way? or Would a contractor claim over restrictive needs?).
- Provide "straw man" alternatives (What if? or Why can't this be done?).

**4.2.5 Select Technique to Improve Description of Need**

When the requirement is for a new or complex product or service, it is often in the Government's best interest to consult with major businesses to improve the description of need(s), or to test and determine the private sector's interest in meeting the need. Exhibit 4-10 lists the available techniques and when they should be used.

**PROBLEMS RESOLVED???**

*You have completed the review of the SOW for inadequacies and communicated your concerns and recommendations to the Requiring Activity. It was agreed that site inspections would be the appropriate approach and acceptance would be on multiple performance completion dates that could be identified as separable items of work. The problem of making the tasks clearer was still unresolved. The Project Manager asked if potential offerors could be contacted prior to the issuance of the Request For Proposal (RFP) to assist in improving the description.*

*What is the proper procedure for soliciting information from the private sector?*

## SPECIFICATIONS

<b>DECISION TABLE</b> <b>Selecting Techniques for Testing and Improving Government Description of Need(s).</b>	
<i>SELECT</i>	<i>IF:</i>
Industry Panel	<ul style="list-style-type: none"> <li>• The need can be identified but the most beneficial approach is unknown.</li> <li>• Input from experts in industry would eliminate non-essential or obsolete requirements.</li> <li>• It will test the market's capabilities to perform the requirement.</li> </ul>
Solicitation for Information or Planning Purposes	<ul style="list-style-type: none"> <li>• There is a need for written responses.</li> <li>• A more economical or less formal means of obtaining information cannot be obtained from potential sources.</li> <li>• There is a possibility that there could be several approaches to obtaining the final product.</li> </ul>
Presolicitation Notices	<ul style="list-style-type: none"> <li>• There is a need to develop or identify sources.</li> <li>• Additional information is needed to test market's capabilities.</li> <li>• There will be a presolicitation conference followed by a formal solicitation.</li> </ul>
Presolicitation Conference	<ul style="list-style-type: none"> <li>• Additional insights from the contractors could produce an improved SOW that would result in a more incisive solicitation document.</li> <li>• Information as to the nature and size of the procurement may generate more competition.</li> <li>• Submission of proposals would be time consuming and costly; advance planning by the contractors may be necessary.</li> <li>• There is a need to identify interested sources to solicit.</li> </ul>

*Exhibit 4-10*

**4.2.6 Implement Techniques**

As a contract specialist, you will share the responsibility with the requiring activity for selecting, initiating, and controlling the procedures on any selected technique for testing and improving the Government's description of need(s).

**Industry Panels**

Close coordination with the requiring activity is required when convening panels to obtain adequate and complete specifications/SOW. Exhibit 4-11 describes the steps in utilizing industry panels to improve the Government's description of the need.

**Solicitations for Information or Planning**

If it is deemed necessary to obtain written information to test or improve the description of need(s) or for planning purposes, a written solicitation for information or planning purposes may be issued **IF**:

FAR 15.405
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- Contracting officer determines in writing that procedure is justified.
- Determination is approved at a level higher than contracting officer.

FAR 52.215-3
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When preparing a solicitation to be issued for information or planning purposes, you must insert on the face of the document the provision titled:

**Solicitation for Information or Planning Purposes.**

This provision, in effect, puts the contractor on notice that the Government does not intend to award a contract on the basis of this solicitation or otherwise pay for the information solicited.

FAR 15.402(e)
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A Request for Quotations (RFQ) may be used when the Government does not intend to award a contract on the basis of the solicitation but



### STEPS IN UTILIZING INDUSTRY PANELS

1. PUBLICIZE PANEL MEETING SCHEDULE:

To obtain broad coverage, this should be synopsized in the Commerce Business Daily (CBD). If authorized by Agency regulations, other media formats may be utilized (i.e., newspapers, trade journals, etc).

2. SELECT MEMBERS:

Based on response from publicizing the meeting, recommendations from the Requiring Activity and data obtained from market research, select a representative sample of suppliers and acknowledged leaders in industry.

3. BRIEF REQUIRING ACTIVITY ON THEIR ROLES:

They should be able to address such areas as known problems with the requirement, previous approaches and/or failures if applicable and respond to questions of a technical nature.

4. ESTABLISH GOALS OF THE PANEL:

Identify the objective of the meeting and what information should be forthcoming to accomplish the objective.

5. LEAD DISCUSSIONS:

This does not necessarily mean that as a contract specialist you get into technical discussions with the panel or other participants, but to act as a panel moderator if necessary, to ensure all needed areas are covered.

6. DISSEMINATION OF INFORMATION:

Make all information provided to the panel, along with complete transcripts of the panel sessions, available to other interested parties, along with all comments and recommendations from the panel.

*Exhibit 4-11*

Presolicitation Notices wishes to obtain price, delivery, or other market information for planning purposes.  
Whenever a requirement is complex and the available description of need and/or the sources sought are limited, the best recourse for you to

**PURPOSES OF A PRESOLICITATION NOTICE****FAR 15.404**

- Develop or identify interested sources;
- Request preliminary information based on a general description of the supplies or services involved;
- Explain complicated specifications and requirements to interested sources;
- Aid prospective contractors in later submitting proposals without undue expenditure of effort, time, and money.

*Exhibit 4-12*

consider is issuing a presolicitation notice, the purposes of which are described in Exhibit 4-12:

Presolicitation notices shall be synopsisized in the CBD.

- Define as explicitly as possible the information to be furnished in the response;
- Indicate whether it is contemplated that the presolicitation notice will be followed by a conference and a formal solicitation;
- Request an expression of interest in the contemplated acquisition by a specified date.

In complex acquisitions, the presolicitation notice may also request information pertaining to management, engineering, and production capabilities. Detailed drawings, specifications, or plans will not normally be included with a presolicitation notice.

Responses to a presolicitation notice may eliminate the need for further communications prior to release of the official RFP, by providing a basis for modifying the SOW.

## SPECIFICATIONS

## NOTES

# CHAPTER 5

## SERVICES

### A HAZARDOUS REQUIREMENT

*As a result of a safety inspection, the Agency Head must correct several deficiencies. The major correction requires removal of asbestos from three buildings.*

*In reviewing the requisition package, you discover that the required certifications and approvals are missing. You request the omitted information from Jess Lucky, the project manager.*

*Can Government employees be used to remove the asbestos rather than contractor employees?*

*Are the services personal or nonpersonal?*

*Does the Service Contract Act apply?*

## **COURSE LEARNING OBJECTIVES**

At the completion of this course, you should be able to:

### **Overall:**

1. Identify requests to purchase personal services and determine whether to procure the requested services.
2. Identify requests for advisory and assistance services and determine whether to proceed with the procurement of the requested services.
3. For work covered by the Service Contract Act, identify required skill classifications and prepare requests for wage determinations from the Department of Labor (DOL).

### **Individual:**

### **REVIEWING PRs FOR SERVICES**

- 5.1.1 Identify requirements for services.
- 5.1.2 Determine whether the required services are personal or nonpersonal.
- 5.1.3 Determine if the requirement is for advisory or assistance services.

### **OBTAINING WAGE DETERMINATIONS**

- 5.2.1 Determine if the Service Contract Act applies.
- 5.2.2 Notify interested parties of the impending acquisition.
- 5.2.3 Prepare requests for wage determinations
  - Identify skill classifications.
  - Estimate the number of service employees in each class.
  - Identify wage rates that would be paid to comparable Government employees.
  - Obtain a copy of the CBA.
  - Identify the places of performance.
  - Complete SF98 and SF98(a).
- 5.2.4 Review wage determination and incorporate into solicitation.
  - Expedite and obtain DOLs response to the requests.
  - Determine whether to appeal the wage determinations.
  - Incorporate wage determinations.
  - Reverify wage determinations.
- 5.2.5 Update wage determinations when allowed by the terms of the contract.

## INTRODUCTION TO SERVICES

### Service Contract

**FAR 37.101**

A contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either nonpersonal or personal in nature. The contract can cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

### Policy

**FAR 37.102**

1. Agencies shall generally rely on the private sector for commercial services (OMB Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government).
2. Contracts cannot be awarded for the performance of an inherently governmental function.
3. Consider and compare the relative costs of Government and contract performance.
4. Nonpersonal service contracts are proper under general contracting authority.

Service contracts generally cover one year periods with options to extend performance beyond one year. Options can cover short durations (up to 6 months) when necessary to resolve administrative delays or can cover additional one year increments not to exceed a total of five years unless otherwise authorized..

### Service Contract Act of 1965

Provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts exceeding \$2500.

### Steps in Reviewing Purchase Requests for Services

The steps in reviewing purchase requests for services are charted on the next page. Following the flowchart, each step is discussed in turn in Subchapter 5.1. The flowchart and discussion for obtaining wage determinations is found in Subchapter 5.2

## STEPS IN REVIEWING PRs FOR SERVICES

1 Identify requirements for services.

2 Determine whether the required services are personal or nonpersonnel.

*Do not process a PR for personal services unless:*

- Personal services are authorized, or*
- The purchase description is recast in nonpersonal terms.*

3 Determine if the requirement is for advisory or assistance services.

*Do not process a PR for advisory or assistance services unless the requirements at FAR 37.202, 37.206, and 37.207 are met.*

4 Determine whether to restrain the awardee from competing for follow-on contracts.

# STEPS IN REVIEWING PRs FOR SERVICES

## 5.1 REVIEWING PRs FOR SERVICES

### 5.1.1 Identify Requirements for Services

You must classify the requirement as a supply or service. The entire acquisition strategy and methodology is affected by this classification. Once a requirement is classified as a service, there will be additional tasks you may have to perform, such as:

- obtaining wage determinations,
- evaluating collective bargaining agreements,
- regular contract surveillance, etc.

Many times classifying the requirement as a service is easy:

janitorial,  
maintenance,  
health.

Other times, identifying a requirement as a service is more difficult:

airline flights,  
specifically developed reports,  
extensive repair of equipment.

FAR 2.101

In order for you to be able to classify the requirement, you must be able to distinguish between supplies and services.

**Supplies** (See Exhibit 5-1 for examples) means:

"all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools, and the alteration or installation of any of the foregoing."

**Services** (See Exhibit 5-2 for examples) means:

"Services are any effort which is essentially labor intensive whose principal purpose is the delivery or investment of people's time rather than an end-product."

This does not prohibit the use of interim or end-products in a service contract; in fact, there usually are.



## SERVICES

EXAMPLES OF SUPPLIES	
Ammunition and explosives.	Furniture.
Vehicular equipment components.	Office supplies.
Engines, turbines, and components.	Guided missiles.
Books, maps and other publications.	Software and hardware.
Woodworking machinery and equipment.	Metalworking machinery.
Containers, packaging, and packing supplies.	
Medical, dental, and veterinary equipment and supplies.	

*Exhibit 5-1*

EXAMPLES OF SERVICES	
Automatic Data Processing (ADP)	Systems Engineering
Maintenance of Real Property	Transportation
Administrative or Office Work	Studies and Analyses
Housekeeping and Base Services	Health Services
Research and Development	Training
Architect-Engineering	Surveys
Communications Services	
Operation of Government-owned equipment facilities	

*Exhibit 5-2*

You will need to ask:

"What is the principal purpose of this requirement?"

If the answer is:

"The contractor's time and effort is to perform an identifiable task rather than to provide an end item of supply,"

then the requirement is for a service.

### **Examples:**

"What is the principle purpose of a requirement for office cleaning?"

A proposed contractor will bid according to how much it would cost him to pay the employees to actually clean the office. Any supplies provided in performing this task would be incidental.

"What is the principle purpose of an engineering study which results in a formal report of findings?"

The objective of the requirement is on the actual research performed by engineers and not on the document revealing the results. The

contractor's bid emphasizes the costs associated with the research and not the written document.

Classifying a requirement as a service simply means the Government is predominantly paying for time as opposed to the cost of physical assets such as buildings, equipment, or materials.

You may not improperly classify a requirement for services as a supply in order to circumvent these laws and regulations. You are the official responsible for classifying the requirement. When you have reasonable doubts about the requirement, consult with your legal counsel and document the file.

### **5.1.2 Determine if Services are Personal or Nonpersonal**

Once you have classified the requirement as services, your next step will be to determine whether the service is of a personal or nonpersonal nature. The difference is whether the contractor's personnel are subject to direct supervision and control of Government officials.

Not all requiring activities will indicate when their requirement is for nonpersonal services. When an agency has a need for services to be performed, but the personnel ceiling cannot be raised to allow them to hire individual(s), they may attempt to contract out for those services. Such practices would circumvent the civil service hiring laws.

**FAR 37.104(a)**

"The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws."

Therefore, you will need to scrutinize every services requirement carefully. In doubtful situations, you must not procure personal services without obtaining legal counsel, as agencies must have specific statutory authority to award contracts for personal services.

### **Aren't all services personal in nature?**

The Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source. Generally, any service performed by commercial sources is considered to be nonpersonal in nature since the preference is to contract for these services and not to perform them in-house.

## SERVICES

Certain functions, however, are inherently governmental in nature being so intimately related to the public interest as to mandate performance only by federal employees. These functions involve activities which require either ① the exercise of discretion in applying Government authority or ② the use of value judgment in making decisions for the Government.

Inherently governmental functions include

- criminal investigations;
- prosecutions and other judicial matters;
- management of Government programs requiring value judgments;
- management and direction of the Armed Services and the national defense.

These functions are not in competition with the commercial sector and are rightly performed by Government employees. Any requirements covering these functions are considered personal services.

☞ **NOTE:** Nonpersonal service contracts that are improperly administered may become personal service contracts and, therefore, improper. You must make sure the methods used to administer any nonpersonal service contract do not result in direct supervision of contractor employees by the Government.

### **What constitutes direct supervision?**

Rejecting performance or deliverables provided as a result of a service contract does not constitute direct supervision. The Government must make a decision whether a service is acceptable for payment purposes.

Sporadic, unauthorized supervision of only one of a large number of contractor employees also does not constitute the direct supervision intended under personal service contracts. Direct supervision is relatively continuous Government supervision of contractor employees.

Factors to consider in determining if a government employer-contractor employee relationship exists are:

**FAR 37.104(d)**

1. Performance on site.
2. Principle tools and equipment furnished by the Government.
3. Services are in furtherance of assigned function or mission.
4. Civil service personnel are performing comparable services.
5. The service will be needed beyond one year.
6. Requires Government direction, directly or indirectly.

If any of these factors are present, you will have to carefully review the overall requirement to determine if the service is personal in nature.

Exhibit 5-3 provides examples of personal and nonpersonal services.

<b>PERSONAL AND NONPERSONAL SERVICES</b>	
<b>PERSONAL</b>	<b>NONPERSONAL</b>
Day-to-day stenographic and secretarial duties in a Government office under Government supervision.	Maintenance of ADPE equipment
A contract with an accounting firm to perform day-to-day accounting functions for the Government.	Medical services
An engineer integrated into the organization of a federal agency.	Audit services
	Lawn care and gardening services

*Exhibit 5-3*

**Temporary Help Services** Contracts with temporary help service firms for the brief or intermittent use of the skills of private sector temporaries shall not be treated or regarded as personal services. These services shall not be used in lieu of regular recruitment under civil service.

While there are no definite rules for characterizing particular services as personal or nonpersonal, Exhibit 5-4 illustrates factors to be considered in your determination.

Unless the personal services are authorized by statute, you must return the purchase request to the requiring activity to be recast in nonpersonal terms.

You may obtain advice from the Office of Personnel Management if you are having difficulty making a determination.

## SERVICES

### **FACTORS THAT TEND TO CHARACTERIZE SERVICES AS PERSONAL RATHER THAN NONPERSONAL**

1. Government can obtain civil service employees to do the job, or whether, on the other hand, the contractor has specialized knowledge or equipment that is unavailable to the Government.
2. Services represent the discharge of a Government function that calls for the exercise of personal judgment and discretion on behalf of the Government.
3. Requirement is continuing rather than short-term or intermittent.
4. Government reserves the right to assign tasks to and prepare work schedules for contractor employees during performance of the contract. (Note: However, that at the inception of a nonpersonal services contract, the CO may incorporate work schedules for the contractor or may establish a time period for performance of orders).
5. Government retains the right (whether actually exercised or not) to supervise the work of the contractor personnel, either directly or indirectly.
6. Government reserves the right to supervise or control the method by which the contractor performs the service, the number of people employed, and the special duties of individual employees.
7. Government will review performance by each individual contractor employee, as opposed to reviewing a final product or service on an overall basis after completion of work.
8. Government retains the right to have contractor personnel removed from the job for reasons other than misconduct or security.
9. Contractor personnel are used interchangeably with Government personnel to perform the same functions.
10. Contractor personnel are integrated into the Government's organizational structure.

*Exhibit 5-4*

### 5.1.3 Determine if Service is Advisory or Assistance

Having determined that the requirement is for services and is not personal in nature, you next need to consider whether it is an advisory or assistance service. Advisory and assistance services mean

**FAR 37.201**

"services to support or improve agency policy development, decision-making, management, administration, and operation of management systems."

There are several types of advisory and assistance services, as diagrammed in Exhibit 5-5.

TYPES OF ADVISORY AND ASSISTANCE SERVICES		
SERVICES	DESCRIPTION	RESULTS
Individual Experts and Consultants	Persons possessing special, current knowledge or skill combined with extensive operational experience.	Information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making.
Studies, Analyses, and Evaluations	Organized, analytic assessments that provide insights necessary to understanding complex issues or improving policy development or decision-making.	Structured documents containing data or leading to conclusions and/or for recommendations.
Management and Professional Support Services	Advice, training, or direct assistance for organizations to improve efficiency or operations of managerial, administrative, or related systems.	Information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems.
Engineering and Technical Services	Advice, training, or under unusual circumstances, direct assistance.	To improve efficiency or operation or maintenance of existing platforms, weapon systems, related systems, and associated software.

*Exhibit 5-5*

In order for you to contract for advisory and assistance services, it must be essential to the agency's mission to:

**FAR 37.202(b)**

1. Obtain outside points of view to avoid too limited judgment on critical issues;
2. Obtain advice regarding developments in industry, university, or foundation research;

## SERVICES

3. Obtain the opinions, special knowledge, or skills of noted experts;
4. Enhance the understanding of, and develop alternative solutions to, complex issues;
5. Support and improve the operation of organizations;
6. Ensure the more efficient or effective operation of managerial or hardware systems.

Exhibit 5-6 lists the types of non-defense specific programs that are **excluded or exempted** from the definition of advisory and assistance services.

### ACTIVITIES AND PROGRAMS THAT ARE NOT DEFINED AS ADVISORY AND ASSISTANCE SERVICES

FAR 37.204

- Activities that are reviewed in accordance with OMB Circular A-76 on acquiring commercial or products and services.
- Architectural and engineering services.
- ADP/Telecommunications functions and related services that are controlled in accordance with the Federal Information Resources Management Regulation
- Day-to-day operation of facilities and functions.
- Government-owned, contractor-operated facilities.
- Clinical medicine and research on basic medical, biological, social, etc. phenomena.
- Those support services of a managerial or administrative nature performed as a simultaneous part of, and nonseparable from specific development, production, or operational support activities.
- Contracts entered into in furtherance of statutorily mandated advisory committees.
- Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.
- Routine maintenance of equipment, routine administrative services, printing services, and direct advertising costs.
- Auctioneers, realty-brokers, appraisers, and surveyors.

*Exhibit 5-6*

**FAR 37.202(c)**

Many times the requiring activity is not familiar with these regulations, and it is up to you to ensure that they are complied with. Advisory and assistance services **cannot** be used by the requiring activity to:

1. Perform work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;
2. Bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
3. Contract for, on a preferential basis, former Government employees;
4. Specifically aid in influencing or enacting legislation;
5. Obtain professional or technical advice which is readily available within the agency or another Federal agency.

If you determine that the requiring activity's requirement is prohibited, you must advise them to

- recast their requirement or
- do the work in-house.

If you determine that the requirement for advisory and assistance services is legitimate, you must:

**FAR 37.207**

1. Take action to avoid any organizational conflicts of interest that:
  - result in an unfair competitive advantage to the contractor
  - impair the contractor's objectivity in performing the work.
2. Have complied with the procedures in this subchapter.
3. Obtain a statement of need and certification from the requiring official, if not attached to purchase request.
4. Obtain any specific agency approvals.

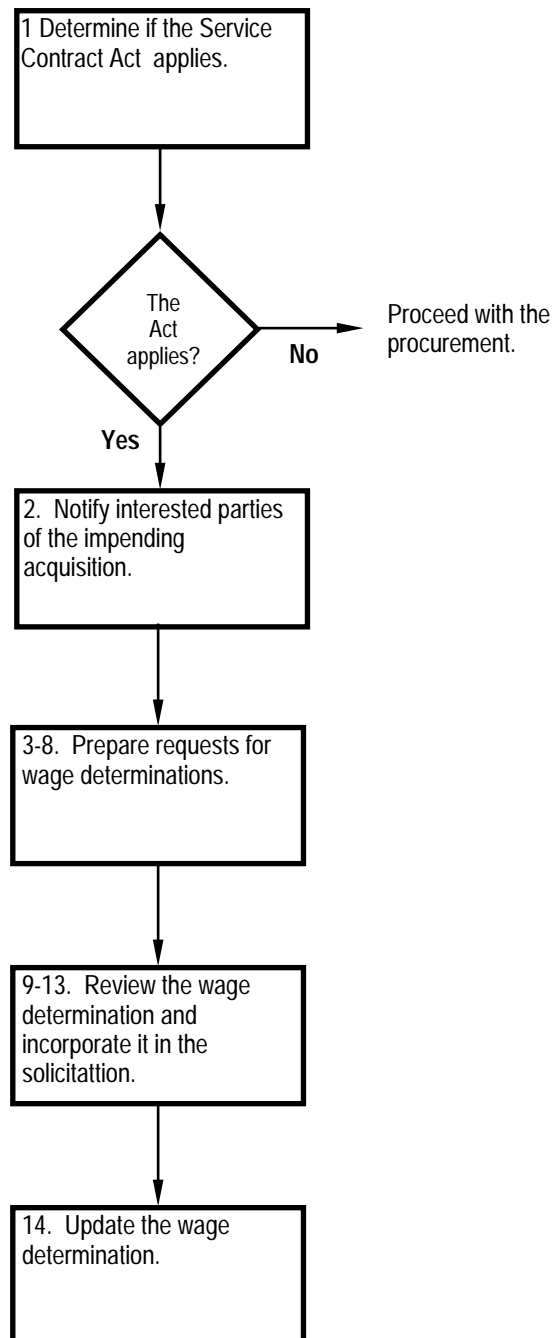
## Conflicts of Interest

**FAR 9.507**

When a particular acquisition involves a significant potential organizational conflict of interest, prepare a written analysis of the situation for approval as required by agency procedures.



## STEPS IN OBTAINING WAGE DETERMINATIONS



# STEPS IN OBTAINING WAGE DETERMINATIONS

## 5.2 OBTAINING WAGE DETERMINATIONS

### 5.2.1 Determine if the SCA Applies

The Service Contract Act (SCA) of 1965, as amended, was enacted to ensure that Government contractors compensate their blue collar and some white collar service employees fairly. Any procurement, that requires services to be performed by the types of employees covered by the SCA, must comply with the provisions of the Act.

For the most part, the SCA requires contractors to pay their employees, who will be utilized to perform the contract, not less than the prevailing wage for such employees in the locality. Contractors are prevented, therefore, from bidding such low prices that they would be relieved of paying the employees the market rate for their occupation and locality.

**FAR 22.1001**

Occupations **not** covered by the SCA include

- Executive: One whose primary duty is managing.
- Administrative: One who performs office or non-manual work related to management policies or business operations
- Professional: One whose duties are of a scientific or artistic nature, or one who instructs.\*

In addition, the SCA does **not** apply when:

**FAR 22.1003-2,3,4**

1. Contract is under \$2500.
2. Davis-Bacon applies (construction/alteration of public building).
3. Walsh-Healey applies (supplies).
4. Communication Act applies (radio, telephone, telegraph, cable).
5. Published Tariffs exist (transporting freight or personnel).
6. Authorized by other statutes (public utility, USPS).
7. Contracting for employment providing direct services.
8. Contract will not be performed in the U.S.
9. Exempted by the Secretary of Labor.

Exhibit 5-7 gives examples of services that are covered by the SCA.

\* However, see the end of Section 5.2.1 on "Wage Busting" for professional employees.

## SERVICES

### SERVICES COVERED BY THE SERVICE CONTRACT ACT

FAR 22.1003-5

- Motor pool operation, parking, taxicab, and ambulance.
- Packing, crating, and storage.
- Custodial, janitorial, housekeeping, and guard services.
- Food service and lodging
- Laundry, dry-cleaning, linen-supply, and clothing alteration and repair.
- Snow, trash, and garbage removal.
- Aerial spraying and aerial reconnaissance for fire detection.
- Grounds maintenance, landscaping, and other support services.
- Drafting, illustrating, graphic arts, stenographic reporting.
- Electronic equipment maintenance and operation and engineering support
- Maintenance/repair of equipment: e.g., engines, vehicles, office and business.
- Operation, maintenance, or logistics support of a Federal facility.
- Data collection, processing, and analysis.

*Exhibit 5-7*

Sometimes services and supplies are required under the same contract.

As a general rule:

If the service work is an **incidental** part of contract performance, the SCA does not apply.

If the service portion of the requirement will be **priced separately and the amount exceeds \$2500**, you must apply the SCA for that portion of the requirement only.

Exhibit 5-8 provides examples of determining the principal purpose of a requirement:

### EXAMPLES OF DETERMINING PRINCIPAL PURPOSE

Contract requires:

Site clearance and a facility to be constructed on the cleared site.

Site clearance and seeding.

Maintenance and repair of heavy mechanical equipment with the contractor furnishing repair parts as necessary.

SCA:

**Does not apply** to the site clearance services since the principal purpose of the contract is construction.

**Applies** since the principal purpose is the delivery of services, i.e., site clearance and seeding.

**Applies** even though the volume or value of parts furnished may be substantial because the principal purpose is the furnishing of repair services.

*Exhibit 5-8*

**FAR Subpart 22.11**

In addition to blue collar and some white collar service workers, you must "consider" wages paid to professional employees:

Office of Federal Procurement Policy Letter No. 78-2, Preventing Wage Busting for Professionals, provides procedures for use in negotiated service contracts exceeding \$500,000 that involve meaningful numbers of professional employees.

If you have determined the requirement will be performed by "meaningful" numbers of professional employees, the provisions;

1. "Notice of Compensation for Professional Employees" and
2. "Evaluation of Compensation for Professional Employees" must be included in the solicitation.

**FAR 22.1002-4**

Even when the SCA does not apply, no contractor holding a service contract for any dollar amount shall pay its employees working on the contract less than the minimum wage specified in the **Fair Labor Standards Act**.

**5.2.2 Notify Interested Parties under Collective Bargaining Agreement**

Before you solicit for any requirement subject to the SCA, you must determine the Department of Labor (DOL) wage rates and benefits to be paid to the employees who will be performing under the proposed contract.

**FAR 22.1010**

To begin you need to determine if there is a contractor performing on a current contract whose employees are covered under a collective bargaining agreement. A collective bargaining agreement is made between a firm and its employees usually through an established union which establishes wages and fringe benefits paid to the employees.

Next, you must give written notification to ① the agent for the employees and ② the incumbent contractor:

- Include all acquisition milestone dates.
- Send 30 days prior to the earliest acquisition milestone date.
- Send even when you are considering exercising an option or extension of contract, or change in scope.
- Send on anniversary date of multiple year contract.

Any successor contract cannot reflect changes made in the incumbent's collective bargaining agreement unless the contracting officer receives notification of changes before establishment of the wage determination.

## SERVICES

### 5.2.3 Prepare Request for Wage Determination

FAR 22.1008-3(g)

#### STEP 1: IDENTIFY SKILL CLASSIFICATIONS

You are required to identify the classes of service employees in the solicitation.

- When a collective bargaining agreement exists, the skill classifications is nothing more than an exact duplicate of the classes shown in the agreement.
- When there is no incumbent contractor, you will establish the job titles and descriptions.

The Service Contract Act Directory of Occupations contains many classifications to help you in identifying job titles and descriptions. However, if you are unable to locate a skill in the Directory you must develop one to use for the procurement. Technical support can be obtained from

- Requiring activity or
- Agency personnel office.

It is important to clearly define the skills so that all prospective bidders will be able to match their employees skills with the ones identified in your solicitation.

#### STEP 2: ESTIMATE NUMBER IN EACH SKILL CLASS

The requiring activity or the incumbent contractor are the best sources for this information. The estimated numbers are provided to the Department of Labor when requesting wage determinations. When the total number to be used is less than five employees, wage determinations are not mandatory but still must be sent to DOL if over \$2500.

#### STEP 3: IDENTIFY COMPARABLE RATES FOR GOV'T.

FAR 22.1016

You must include in solicitations and contracts the wage rates that would be paid to the service employees to be utilized under the contract if they were employed by the requiring activity. The agency civilian personnel office can assist you in providing grade and salary data. In general, the following guidelines apply:

1. **Blue collar** employees are paid the basic hourly rate for each class:
  - Nonsupervisory are paid Wage Board pay schedule step two.
  - Supervisory are paid Wage Board pay schedule step three.
2. **White collar** employees are paid an hourly rate for each class:
  - Divide the General pay schedule step one biweekly rate by 80.

#### STEP 4: OBTAIN COPY OF BARGAINING AGREEMENT

FAR 22.1008-3

In accordance with the SCA (for similar services in the same locality), **a successor contractor must pay wages and fringe benefits to service employees at least equal to those agreed upon by a predecessor, i.e. incumbent, contractor operating under a CBA.**

Therefore, you must obtain a copy of the predecessor's CBA as soon as possible in the procurement cycle from the:

- ACO responsible for administering the previous contract.
- Previous SF 98/98a, Notice of Intent to Make a Service Contract, or
- Predecessor contractor per section "m" the SCA OF 1965, AS AMENDED clause.

FAR 52.222-41

However, this provision of the SCA will not apply if:

1. Predecessor contractor enters into a CBA for the first time and the agreement does not become effective until after the predecessor's contract expires.
2. Predecessor contractor enters into a new or revised CBA during the period of its current contract performance but the contracting agency does not receive notice of the terms of the new CBA
  - within 10 days of bid opening or
  - after award of negotiated contract.
3. DOL determines the wages/benefits in the CBA shall not be used to establish the wage rate for this requirement.

The CBA may apply to only part of the requirement (e.g., one of several locations or skill classes). You must identify to which locations and skills the CBA applies and those that do not apply.

#### STEP 5: IDENTIFY THE PLACES OF PERFORMANCE

Since wage determinations have a geographic orientation, you must list the place(s) of performance on the SF 98/98a. If the service is to be performed on Government premises, identifying the place is simple.

FAR 22.1009-3,4

If the place of performance is dependent upon who is awarded the contract, this task becomes more difficult because SF98 is submitted to DOL before the solicitation is issued:

- List all known places of performance from:
  - Previous contractors and competitors.
  - Solicitation mailing list.
  - Responses to presolicitation notice.

## SERVICES

FAR 52.222-49

- If other places are possible but unknown, include in CBD
  - statement that the place of performance is unknown,
  - list of all known places of performance,
  - notice that wage rates for new places will be requested,
  - cut off date for making additional wage rate requests; andinclude the SERVICE CONTRACT -- PLACE OF PERFORMANCE UNKNOWN clause in the solicitation.

Submit any written requests received on time to DOL and amend the solicitation to incorporate all additional wage determinations.

There may be times when the offeror in line for award has identified a place of performance that ① was not included in the wage determination and ② for which the offeror did not submit a written request.

1. You will proceed to award the contract to that firm.
2. After award, request a wage determination and incorporate those wages and benefits into the contract retroactive to the date of award.
3. If the contractor's price was based on wages and benefits that were less than the wage determination they are required to pay their service employees, incorporate the wage determination amount without any adjustment in the contract price.

### STEP 6: COMPLETE SF98/98a

Now that you have obtained all the necessary information, complete the SF 98/98a or NOTICE:

FAR 22.1008-7

- For recurring or known service requirements, the form must be filed not less than 60 or more than 120 days prior to issuance of solicitation, option exercise, or other contract actions.
- For unanticipated requirements, the form shall be submitted as soon as possible, but no later than 30 days prior to issuance of solicitation, etc. along with a written explanation that the requirement is nonrecurring or unknown.

Exhibit 5-8 illustrates a completed SF98/98a.

Mail the NOTICE requesting wage determinations to:

Administrator, Wage and Hour Division  
U.S. Department of Labor  
Washington, DC 20210.





[illegible]

5-22

### 5.2.4 Review Wage Determinations

FAR 22.1011-1

#### STEP 1: EXPEDITE DOL'S WAGE DETERMINATION

In situations requiring an immediate wage determination response:

- check your agency's procedures, then
- contact DOL by phone for guidance before submitting the NOTICE.

You should receive DOL's response within 30-60 days after submission. The effective date of the wage determination is the signed date shown in the response block. DOL's response will be one of the following:

1. Wage determination.
2. No wage determination in effect for the locality of performance.
3. Service Contract Act is not applicable.
4. Return NOTICE for additional information.

#### STEP 2: DECIDE TO APPEAL WAGE DETERMINATIONS

Sometimes there are problems that become evident after the wage determination is received from DOL:

**For example:** If union employee wages and benefits significantly vary from those prevailing for similar services in the locality, it may be due to unforeseen reasons:

- extremely low prevailing rates caused by economic fluctuations, or
- substantially higher union rates, or
- other matters that are suspicious of improper negotiations between the contractor and the union.

FAR 22.1013

When there is no CBA, contact the agency labor advisor if the wage determination does not conform with the prevailing wages for similar services in the locality or the wage determination contains significant errors and omissions.

When a CBA is involved, a hearing with DOL may be requested by the contracting officer or a protesting contractor to provide evidence showing the variance in rates.

Hearing requests must be received by DOL, at a minimum, 10 days

- before award of a sealed bid contract, or
- before the start of a negotiated contract or exercise of an option.

Failure to submit the request in a timely manner may result in DOL's refusal to grant a hearing.

## SERVICES

### STEP 3: INCORPORATE WAGE DETERMINATIONS IN IFB/RFP

DOL's wage determination must be included in the solicitation and contract.

If DOL has not responded within the required timeframe, you must incorporate the determination when received except as indicated in Exhibit 5-10.

EXCEPTIONS TO INCORPORATING WAGE DETERMINATIONS	
FAR 22.1012-2,3	
No CBA	CBA Applies
There are less than 10 days before bid opening, and you cannot extend the date.	There are less than 10 days before bid opening, and you cannot extend the date.
Contract has been awarded and the start of performance is within 30 days of award.	Contract has been awarded, and the start of performance is within 30 days of award.
	Contract has been awarded and <ol style="list-style-type: none"><li>1. Start of performance is not specified as being within 30 days,</li><li>2. Performance does not commence within 30 days, or</li><li>3. Changed CBA is received within 10 days before performance is to commence.</li></ol>

*Exhibit 5-10*

### STEP 4: REVERIFY WAGE DETERMINATIONS

FAR 22.1014

A wage determination issued by DOL is effective for 60 days. If the contractual action is delayed beyond the 60 days, contact DOL to find out if the determination is still current. Any revised wage rates received must be incorporated in the solicitation or contract if time permits.

#### 5.2.5 Update Wage Determinations when Permitted by the Contract

Typically, you need to request an updated wage determination when:

- Making a modification to change scope of work.
- Exercising an option or extending contract performance.
- Multiple year contract anniversary dates are passed
  - Annually for annually funded contract, or else
  - Biennially if contract exceeds 2 years.

<b>SUMMARY OF REQUIREMENTS OF THE SERVICE CONTRACT ACT</b>		
<b>The CO is required to:</b>	<b>Incumbent with CBA</b>	<b>Incumbent w/o CBA</b>
Notify interested parties of impending acquisition.	Required	Not required
Identify skill classifications.	Required (Attach CBA)	Required
Estimate number of service employees in each skill.	Required	Required
Identify wage rates that would be paid to the members of each class if employed by the Government.	Required	Required
Obtain a copy of the CBA between the contractor or subcontractor and its employees.	Required	Not required
Identify the place(s) of performance.	Required	Required
Prepare request for wage determinations.	Required	Required
Expedite and obtain DOL's response.	Required	Required
Determine whether to appeal the wage determinations to DOL.	If appropriate	If appropriate
Incorporate DOL wage determinations and other applicable provisions and clauses.	Required	Required
Determine whether and how to incorporate a late wage determination in the solicitation or contract.	If appropriate	If appropriate
Reverify wage determinations with DOL.	If appropriate	If appropriate
Update wage determinations when permitted by the terms of the contract.	Required	Required

*Exhibit 5-11*

SERVICES

NOTES

# CHAPTER 6

## SOURCE LISTS

### SATISFYING THE REQUIREMENT

*You must fulfill a requirement for 40 electronic calculators. Historical data indicates that a required source has satisfied the need for these calculators in the last three acquisitions. However, the requiring activity has provided a list of commercial sources for you to solicit.*

*Should you go to the open market before checking required sources?*

*Can a required source meet the need?*

*Do you need a waiver or a clearance before you solicit commercial sources?*

## **COURSE LEARNING OBJECTIVES**

At the completion of this course, you should be able to:

**Overall:** Identify the required source (if any) or develop a source list.

**Individual:**

### **REQUIRED SOURCES**

- 6.1.1 Check required sources.
- 6.1.2 Determine whether the required source(s), if any, can meet the need.
- 6.1.3 Check schedule prices against open market prices for the identical product.
- 6.1.4 Order from the required source.

### **COMMERCIAL OPEN MARKET**

- 6.2.1 Review acquisition histories and market research.
- 6.2.2 Prepare source list.
- 6.2.3 Purge source list.
- 6.2.4 Rotate source list.
- 6.2.5 Update list.

### **QUALIFIED BIDDERS, MANUFACTURERS, & PRODUCT LISTS**

- 6.3.1 Verify applicability of a QBL, QML, or QPL to the procurement.
- 6.3.2 Forward requests for information on a qualification requirement.
- 6.3.3 Screen offers against the QBL, QML, or QPL.
- 6.3.4 Report conditions which merit removal or omission of the source from the QBL, QML, or QPL.

## INTRODUCTION TO SOURCE LISTS

### **What are Required Sources ?**

FAR Part 8

Sources of supplies and services that are Government mandated suppliers that you must procure from before going out on the open market. These sources are often the least costly and most efficient means of obtaining supplies/services for the Government.

### **What are Commercial Sources ?**

FAR 14.205

Sources offering supplies and services in the open market (including educational and nonprofit institutions) that are prospective offerors to a Government solicitation.

### **What are Qualified Sources ?**

FAR SubPart 9.2

Sources that have satisfactorily complied with a Government requirement for testing or other quality assurance demonstration before award of a contract.

### **Steps in Performance**

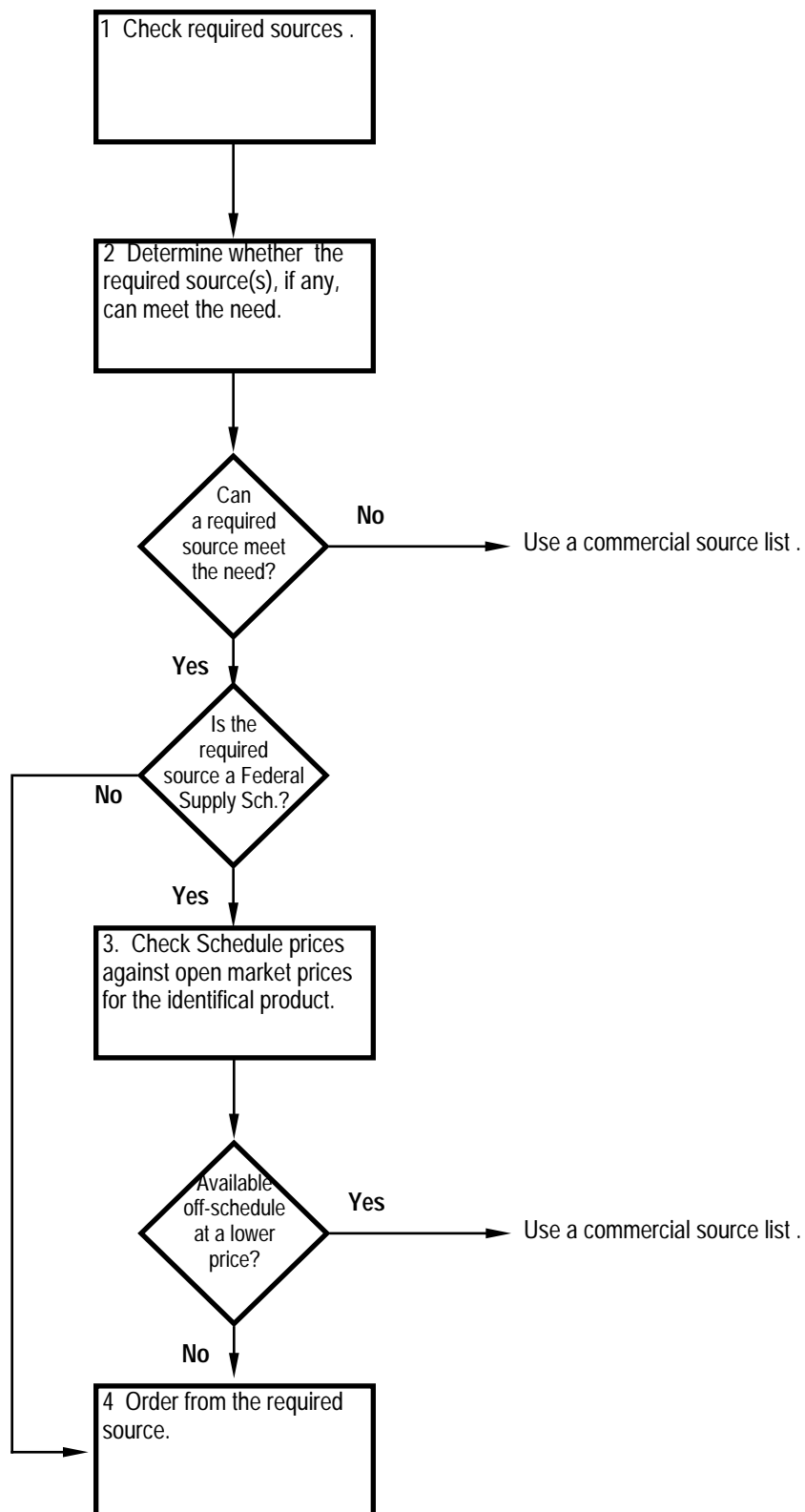
The steps in identifying sources are charted on the next page. Following the flowchart, each step is discussed in turn in Subchapter 6.1.

The flowchart and discussion for preparing source lists are found in Subchapter 6.2.

The flowchart and discussion for preparing qualified lists are found in Subchapter 6.3.



## STEPS IN IDENTIFYING REQUIRED SOURCES



# STEPS IN IDENTIFYING REQUIRED SOURCES

## 6.1 REQUIRED SOURCES

### 6.1.1 Check Required Sources

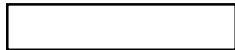
When a requisition is received, you will be required to locate a source which will be able to satisfy the requirement. Before going through the effort of identifying commercial sources to compete for the product or service, you must determine whether the requirement can be satisfied from a variety of "required" sources that have already been established.

These required sources were established to:

1. Take advantage of consolidated purchasing, and
2. Satisfy various socio-economic programs through the purchase of commercial-type products and services.

#### REQUIRED SOURCES INCLUDE:

**Agency Inventories:** An agency established central supply program or facility, stocking frequently used items.



**Excess Personal Property:** Any personal property under the control of an agency which it no longer needs. The property is reported excess to GSA which manages the Government-wide, excess property system.



**Federal Prison Industries, Inc. (FPI):** A self-supporting, wholly owned Government Corporation of the Department of Justice. FPI is also referred to as UNICOR. FPI provides training and employment for federal prisoners through the sale of its products and services to Government agencies.

FAR SubPart 8.7

**Committee for Purchase from the Blind & Other Severely Handicapped:** The Committee is an independent Government activity which determines the supplies and services (and establishes the prices) that are to be purchased through one of the two central nonprofit agencies:

1. National Industries for the Blind (NIB).
2. NISH (formerly National Industries for the Severely Handicapped).

Both NIB and NISH represent nonprofit agencies, such as the local Lighthouse for the Blind and Goodwill Industries. The nonprofit agencies must be approved by the Committee to qualify under this program.

## SOURCE LISTS

**Government Wholesale Suppliers:** There are three Government agencies which stock and manage common use materials for distribution to any Government agency through a depot system:

- General Services Administration (GSA)
- Defense Logistics Agency (DLA)
- Veterans Administration (VA)

The depot system is essential for items which are not readily available in bulk through commercial channels or those for critical mobilization needs.

### FAR SubPart 8.4

**Federal Supply Schedules (FSS):** The FSS program, managed and directed by GSA, provides Federal agencies on a mandatory or optional basis with a simplified process of obtaining commonly used items and services at prices associated with volume buying. VA and the Office of Personnel Management (OPM) also manage schedule programs under GSA direction.

Exhibit 6-1 illustrates the four types of Federal Supply Schedules.

TYPES OF FEDERAL SUPPLY SCHEDULES	
FAR 8.403	
Type	Description
Single-Award	Only one supplier is listed for each product.
Multiple-Award	Several suppliers are listed for each product. You must select the supplier that offers the best deal.
New Item Introductory	Allows new products to enter the system on a trial basis.
International	Provides sources of supply to Government activities located overseas.

*Exhibit 6-1*

**FAR SubPart 8.2**

**William Langer Plant:** A government-owned, contractor-operated plant producing jewel bearings and related items. A jewel bearing is a piece of synthetic corundum used in instruments, mechanisms, subassemblies or parts. A related item is also a piece of synthetic corundum but is used for purposes other than a jewel bearing.

**FAR SubPart 8.8**

**Government Printing Office (GPO):** The Government agency established to provide printing and related supplies for executive departments, independent agencies, or other establishments of the Government. GPO provides printing services:

- Directly through field printing plants operated by executive agencies, or
- Indirectly through contracts with commercial sources.

Each agency designates a central printing authority to act as liaison with the GPO on any printing matter.

**Bureau of Mines:** A branch of the Department of Interior that provides minerals (gold, silver, etc.) including helium for DOD, independent agencies, or other establishments of the Government.

**GSA Specific Programs:** In addition to wholesale and schedule programs, GSA manages three other mandatory supply programs:

Public Utilities	FAR SubPart 8.3
Leased Motor Vehicles	FAR SubPart 8.11
ADP	FAR Part 39

GSA has exclusive authority to enter into long term contracts for utility services (gas, water, steam, electricity, etc.), information resources, and the leasing of motor vehicles to be used within the U.S.

### **6.1.2 Determine If Required Source can Meet the Need**

Once you have identified the appropriate source, your next step will be to determine if there are any reasons why that source cannot be used, such as:

- Product/service does not meet the minimum requirements.
- Delivery terms are unacceptable.
- Value of the requirement is outside established thresholds.

If there is a justifiable reason for not using the required source, you will need to obtain a clearance or waiver, as appropriate and/or document that you considered using the required source and why it was not used.

Exhibits 6-3 and 6-4 provide more specific information on documenting non-use.

## SOURCE LISTS

### 6.1.3 Check Prices Against Open Market

Even though a source is required, you **may not** be obligated to pay the established amount or even use that source if you can show the requirement can be obtained at a lower price from the open market. Exhibit 6-2 provides some examples:

CIRCUMSTANCES PERMITTING CONSIDERATION OF OPEN MARKET PRICES		
Required Source	Circumstance	Action
Areawide contract for public utilities:	Agency can determine it more advantageous when competing services are available from another supplier without an effective areawide contract.	Request GSA to issue a separate contract.
ADP Schedules:	The result of an "Intent to Place an Order" notice in the CBD results in responses quoting lower prices.	Evaluate offers and make award accordingly.
Federal Supply Schedule: (applies to MAS only)	The open market price for an identical item (make and model) is lower.	Notify GSA by submitting a copy of the order placed with the lower priced supplier.
FPI:	The agency believes the FPI price exceeds the market price.	Notify cognizant FPI product division or Washington office for resolution.
Committee for the Blind and Other Severely Handicapped:	Open market prices for the <u>identical item</u> are lower than the Committee established price.	Notify Committee for resolution when agency can justify committee price is not reflective of market price.

*Exhibit 6-2*

On the other hand, the following required sources do not allow market prices to be considered under any circumstances:

- GPO
- Helium
- GSA leased vehicles
- Jewel bearings
- Surplus strategic & critical materials
- Agency inventories
- Excess personal property
- Stock programs
- Federal Supply Schedule (except identical item under MAS)

#### 6.1.4 Order from the Required Source

Procedures for placing an order differ with each required source as shown in Exhibits 6-3 and 6-4. Generally, the requiring activity is not aware of the existence of these sources. Before processing their requisition, you should advise them the item must be purchased from the required source.

Contractor Use of Required Source

FAR Subpart 51.1

You may authorize contractors, working under

- cost reimbursement contracts or
- fixed price contracts requiring protection of classified information

to use some of the required sources, provided:

1. Required source is consulted before authorization is granted to a contractor.
2. Written determination and findings supporting the authorization is placed in the contract file.
3. Contractor agrees to follow the same ordering procedures as required for the Government.

FAR 52.245-1

The GOVERNMENT SUPPLY SOURCES clause must be included in the solicitation and resulting contract.

FAR Subpart 17.5

**NOTE:** While in no way a required source, you can enter into an interagency agreement with another Federal agency, under the authority of the 1932 Economy Act, as amended, for the provision of goods or services when:

1. Only another agency can supply, or
2. Cost comparison has verified that other agency is the best source.

SOURCE LISTS

## REQUIRED SOURCES FOR

PRODUCT/SERVICE	REQUIRED SOURCE	PUBLICATION	
<b>Public Utility</b> - Gas - Electric - Water - Steam - Sewage - Snow & Trash Removal	<b>General Services Adm.</b> Public Building Service Office of Public Utilities (PU) Washington, DC 20405 (202) 501-0901	<b>List of Current Areawide Contract</b> - Service type - Suppliers - Areas served	
<b>Printing &amp; Related Supplies</b> - Printing - Binding - Blankbook Work - Supplies usable in printing - Supplies/services indirectly provided by commercial contractors - Paper - Envelopes	<b>U.S. Government Printing Office</b> Superintendent of Documents Washington, DC 20402-9325 (202) 275-3737	<b>GPO at Your Service!</b> Publication 250.1	
<b>Motor Vehicles</b>	<b>General Services Adm.</b> Fleet Management Division (FBF) Arlington, VA 22202 (703) 557-3077	N/A	
<b>Surplus Strategic &amp; Critical Materials</b>	<b>Defense National Stockpile Center</b> Directorate of Stockpile Contracts, Disposal Division Crystal Square 4, Suite 100 1745 Jefferson Davis Hwy. Arlington, VA 22202 (703) 746-7307	N/A	
<b>Helium</b>	<b>Bureau of Mines</b> Helium Operations 1100 S. Fillmore Amarillo, TX 79101 (806) 376-2638	<b>Bureau Helium</b> Distributors/Contractors and their Shipping Points	
<b>Jewel Bearings</b>	<b>William Langer Plant</b> 213 Northwest First St. P.O. Box 280 Rolla, ND 58367 (701) 477-3193 (X17)	<b>MIL B 27497</b> MILSPEC for bearings, jewels, sapphire, or ruby synthetics.	

*Exhibit 6-3*

## SPECIFIC COMMODITIES

USED UNLESS:	DOCUMENTATION NOT TO USE
<p>Under \$10,000</p> <p>Contract coverage is adequate</p> <p>More advantageous competing services are available from another supplier without an areawide contract.</p> <p>It is in the Government's best interest to negotiate special rates or special services under a separate contract which departs from the published/unpublished current rate schedules of the utility services supplier.</p> <p>Interagency acquisition</p> <ul style="list-style-type: none"> <li>- consolidated purchase</li> <li>- joint use</li> <li>- cross service</li> </ul>	<p>None</p> <p>Request for GSA to issue separate contract</p> <p>Agency Determination for:</p> <ul style="list-style-type: none"> <li>- GSA Separate Contract</li> <li>- GSA Delegation of Authority</li> </ul> <p>Agency Determination for</p> <ul style="list-style-type: none"> <li>- GSA Separate Contract</li> <li>- Delegation of Authority</li> </ul> <p>Memorandum of Understanding between agencies</p>
<p>GPO cannot provide service</p> <ul style="list-style-type: none"> <li>- field printing plants operated by agency</li> <li>- Washington, DC</li> </ul> <p>Authorized by Statute</p>	<p>Approval from Agency Central Printing Authority</p> <ul style="list-style-type: none"> <li>- Use allotments for contract field printing</li> <li>- Congressional Joint Committee on Printing approval to exceed allotments</li> </ul> <p>Memorandum to the file</p> <p>Paper and envelopes may not be acquired through any other source</p>
GSA gives authorization to purchase or lease vehicles	Document contract file to reflect reason for not using GSA after receipt of authorization from GSA.
Defense National Stockpile Center advises they cannot provide.	Document file to reflect reason for not using.
Bureau will make source reference if it cannot provide helium itself	Memorandum to the file
<p>Under \$25,000</p> <p>Items purchased &amp; used outside the U.S.</p>	Contract file should be documented to reflect reason for not using plant

*Exhibit 6-3*



**REQUIRED SOURCES FOR**

<b>PRODUCT/SERVICE</b>	<b>REQUIRED SOURCE</b>	<b>PUBLICATION</b>
Agency Specific Forms Desk supplies	<b>Agency Inventories</b>	Agency Procedures
Excess Property:  Reportable - office equipment - office furniture - scientific equipment Nonreportable	<b>General Services Adm.</b> Federal Supply Service Property Management Division Crystal Mall Bldg 4, Room 709 Arlington, VA 22202 (703) 557-1234	GSA Excess Personal Property Catalog and Bulletins  Personal contact with Regional Area Utilization Officer (app.)
Data/Graphic items - data entry, design, publications Metal items -bunk beds, file cabinets, etc. Textiles Electronics Shoe/Brush Wood/Plastics	U.S. Dept. of Justice <b>Federal Prison Industries, Inc.</b> (UNICOR) 320 First St. NW Washington, DC 20534 (202) 783-5700	"Schedule of Products made in Federal Penal and Correctional Institutions"
Data/Graphic items - data entry, design, publications Metal items -bunk beds, file cabinets, etc. Textiles Electronics Shoe/Brush Wood/Plastics	<b>Committee for Purchase from the Blind &amp; Other Severely Handicapped</b> (703) 557-1145 - National Industries for the Blind (NIB) (703) 998-0770 - NISH (formerly National Industries for the Severely Handicapped) (703) 560-6800	"Procurement List"
Stock Items such as: - Furniture - Industrial products - Office products - Tools  - Heavy machine parts - Hardware - Clothing - Church furnishings  - Medical, dental & hospital equipment - Subsistence items (including dietary foods) - Hospital furniture - Drug - Chemicals	Wholesale source: <b>General Services Adm.</b> Centralized Mailing List Services P.O. Box 17077 819 Taylor St. (7Cail) Ft. Worth, TX 76102-0077 (817) 334-5215  <b>Defense Logistics Agency</b> Commander Defense Logistics Service Center Attn: DLSC-WP Battle Creek, MI 49017-3084 (616) 961-4725 (X6663)  <b>Veterans Administration</b> Dept. of Veteran Affairs Policy & Interagency Service (91A) 810 Vermont Ave., NW Washington, DC 20420 (202) 233-7611	GSA Supply Catalog - NSN Listing - NSN Index - Stock program catalog  Federal Supply Catalog for Civil Agencies  Subsistence Catalog

*Exhibit 6-4*

## COMMON USE ITEMS

Page 2 of 4

USED UNLESS	DOCUMENTATION NOT TO USE	PRIORITY ORDER	
		SUPPLY	SERVICE
Mandatory	N/A	1	N/A
Available from agency inventory.	None	2	N/A
<ul style="list-style-type: none"> <li>- Public exigency</li> <li>- Purchased &amp; used outside US.</li> <li>- Orders \$25 or less and required within 10 days.</li> <li>- Purchases less than carload lots stocked by GSA.</li> </ul>	<b>FPI CLEARANCE</b> <ul style="list-style-type: none"> <li>- General or Blanket</li> <li>- Individual action</li> </ul>	3	N/A
Delivery period is unacceptable. Qty. not available from nonprofit agencies.  FPI provides identical supplies  Specific item (NSN) or service (location) is not on procurement list.	NIB, or NISH Committee grants purchase exception.  None needed if FPI used.	4	1
Federal Supply Schedule price for identical item is better.  Under \$100  \$100-\$1000  \$1000-\$5000  Over \$5000	Memorandum to the file.  None required  Written justification for file <ul style="list-style-type: none"> <li>- quality</li> <li>- timeliness</li> </ul> Same written justification approved by senior procurement official  Obtain waiver from: <b>General Services Adm.</b> Commissioner, FSS Washington, D.C. 20406	5	N/A

*Exhibit 6-4*

**REQUIRED SOURCES FOR**

<b>PRODUCT/SERVICE</b>	<b>REQUIRED SOURCE</b>	<b>PUBLICATION</b>	
Commercial and Commercial-like Products/Services - Boats & motors - Fire-fighting equipment - Lab instruments - Measuring tools - Communication - Lawn & garden equipment - Household appliances - Photocopying machines - Material handling equipment - Hand & power tools - Batteries - Smoke detectors - Dental equipment - Medical equipment - Training Services	<b>General Services Adm.</b> FSS Information Center (FNN) Washington, DC 20406 (703) 557-8177 Autovon: 225-9684  <b>Veterans Administration</b> Marketing Division for Federal Supply Schedules P.O. Box 76 Hines, IL 60141 (312) 216-2485 FTS 381-2485  <b>Office of Personnel Mgmt.</b>	Mandatory Federal Supply Schedules - Single Award - Multiple Award - New Item Introductory - International  GSA Supply Catalog GSA (FBL) Bldg. 41 Denver Federal Center Denver, CO 80225  GSA Supply Catalog (Same as above)	
Commercial and Commercial-like Products/Services  (see above)	<b>General Services Adm.</b> (same as directly above)  <b>Veterans Administration</b> (same as directly above)  <b>Office of Personnel Mgmt.</b> (same as directly above)	Optional Federal Supply Schedules	
Personal property rehabilitation	<b>General Services Adm.</b> General Procurement Branch No. 3 FBG-W 7th & D Streets, SW Washington 20407 (202) 708-6232	Mandatory GSA term contracts	
Personal property rehabilitation	<b>General Services Adm.</b> General Procurement Branch No. 3 FBG-W 7th & D Streets, SW Washington 20407 (202) 708-6232	Optional GSA term contracts	

*Exhibit 6-4 (cont.)*

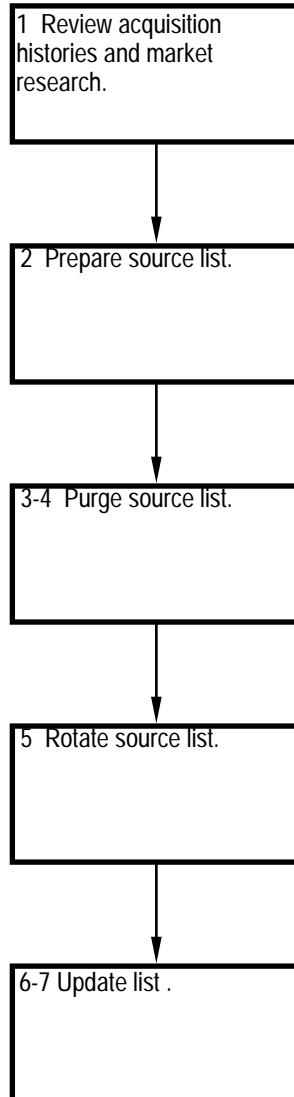
**COMMON USE ITEMS**

Page 4 of 4

USED UNLESS	DOCUMENTATION NOT TO USE	PRIORITY ORDER	
		SUPPLY	SERVICE
Your agency is not a mandatory user of the schedule	None	6	3
Urgency	Memorandum to file		
Under minimum dollar threshold	Memorandum to file		
Exceeds maximum order limitation	Memorandum to file		
Lower open market price than Multiple Award Schedule price for identical (make and model) item.	Report to GSA with copy of purchase order to open market source.		
Award or renewal is pending	Memorandum to file		
Items covered under schedule do not meet minimum needs	Obtain waiver from: General Services Adm. Commissioner, FSS Washington, DC 20406		
Same as mandatory schedules except: Lower open market price than any schedule can be obtained for similar item	Memorandum to file	7	5
Urgency	Memorandum to file	N/A	2
Your agency is not a mandatory user of schedule	None		
Lower open market price than contract can be obtained for same service	Memorandum to file		
Urgency	Memorandum to file	N/A	4
Your agency is not a mandatory user of schedule	None		
Lower open market price than contract can be obtained for same service	Memorandum to file		

*Exhibit 6-4 (cont.)*

## STEPS IN IDENTIFYING COMMERCIAL SOURCES



# STEPS IN IDENTIFYING COMMERCIAL SOURCES

## 6.2 COMMERCIAL SOURCES

### 6.2.1 Review Acquisition History

Once you have determined that none of the required sources of supply can fulfill your requirement, you will need to

1. Analyze your market research (from Chapter 3) including:
  - Solicitation mailing list applications -SF 129
  - Sources provided with purchase request
  - Prior procurement for similar supplies/services
  - Directories and other publications
  - SBA source lists (PASS system)
  - Subcontractors identified by prior prime contractors QPL lists
  - Trade associations
  - Supply schedules
  - Responses to synopses
  - Advertisements
  - Market surveys
2. Obtain sources from any centralized mailing list\*
3. Select sources from market research which are:
  - best suited to the procurement and will result in
  - maximum competition.

### 6.2.2 Prepare Source List

Prepare an initial list showing all known identified sources.

FAR 14.205-1

At a minimum, you will need to include:

- All eligible and qualified concerns who have submitted solicitation mailing list applications;
- Sources that are considered capable of filling the requirements of the procurement; and
- Prospective offerors who have requested past solicitations but are not on current lists.

The list should show the names, addresses and business size of prospective sources. Notify prospective sources that they have been placed on the mailing list or that they do not meet the criteria for placement on the list.

\* Some agencies, such as GSA, maintain automated centralized mailing lists that can be accessed by CBD product or services codes.

## SOURCE LISTS

### 6.2.3 Purge Source List

FAR 14.205-2

Any prior list used to identify sources for the procurement must be updated to include only those firms who

- have demonstrated they are still interested in submitting an offer, or
- have not been debarred or suspended.

You may purge any source which has not responded in any fashion to the last two solicitations. Before you remove any firm, you must determine if sufficient competition would still exist. If the source list would become too limited after purging, request explanation from the nonresponding firms before removing them.

### 6.2.4 Rotate the List

FAR 14.205-4

If, after purging, the number of sources is still excessive commensurate with the dollar value of the proposed contract, you may limit the number of sources to whom solicitations will be sent by using only a portion of the list. However, when the acquisition justifies limiting sources, you **must** send a copy to:

- Previously successful bidder
- Prospective suppliers who have been added since last solicitation
- Firms selected for use in a particular acquisition
- Sufficient number of small business and labor surplus area firms

For the subsequent procurement using the source list, you must then "rotate" or use a different portion of the list. It is very important to manage this list closely so as to be fair to all prospective offerors.

### 6.2.5 Updating the List

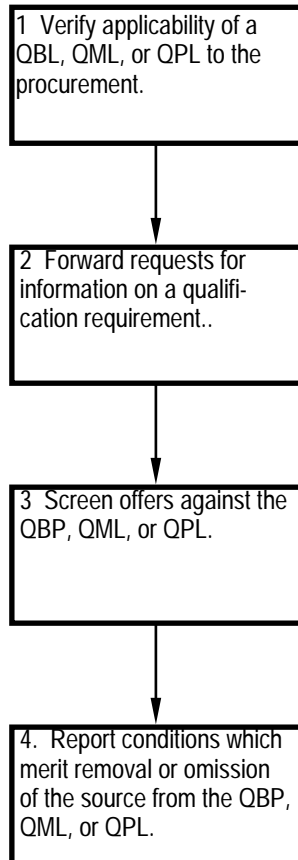
Source lists should be updated before they are used on a new procurement. At a minimum, you must reinstate firms that:

- submit an offer,
- request reinstatement in writing,
- file a new solicitation mailing list application,
- have been removed from the list of excluded parties, or
- respond to synopses, prebid/preproposal conferences, and pre-solicitation notices.



Place the solicitation mailing list in the contract file and record distributions of the solicitation and any amendments issued thereto.

## STEPS USING QUALIFIED BIDDERS, MANUFACTURERS, AND PRODUCTS LISTS





## STEPS IN USING QUALIFIED BIDDERS, MANUFACTURERS, AND PRODUCTS LISTS

### 6.3 QBL, QML, QPL

#### 6.3.1 Verify Applicability

In addition to notifying firms of a pending solicitation, presolicitation notices can be used to canvas suppliers on their current skills, size, and availability. Their responses can be useful in maintaining your source list.

##### FAR 9.201

Agencies have the authority to establish lists identifying which suppliers' products have been examined and tested for compliance with specification requirements. Generally, qualification is performed in advance and independent of any specific acquisition. After qualification, the products or firms are included on a

- Federal or Military Qualified Products List (QPL),
- Qualified Manufacturers List (QML), or
- Qualified Bidders List (QBL).

Since the only offerors or products you are required to consider are those shown on the applicable list or those qualified before award, it is important to determine if a qualified list exists for your procurement.

To determine if a list is applicable, you must check to see if the specification that requires the use of a qualification standard is listed in:

##### FAR 9.203(b)

- GSA Index of Federal Specifications, Standards, and CIDs, or
- DOD Index of Specifications and Standards.

Even though a qualified list applies, there may be situations that require you to consider other sources:

1. You are required to review the applicable qualified list to determine if adequate **competition** exists. Prequalifying sources does not alleviate your responsibility as a contract specialist to maximize competition on a particular procurement.
2. Product/service can be provided by **many sources not listed**.
3. There is **insufficient time** to allow for qualification of new sources.

The requiring activity may be considering other sources or products. They must inform you when they anticipate completing their product evaluations so that other sources can also be considered. The addition of those sources may be necessary to ensure that adequate competition exists.

Also, you may suggest using other methods for testing and demonstrating quality assurance to the requiring activity to promote competition.

If you are still concerned about the degree of competition:

- Presolicitation notices may be issued to advise potential suppliers of a pending solicitation involving qualification requirements. This is especially important if your market research indicates a number of sources not listed can supply the product or service.
- When using presolicitation notices, develop a separate source list.
- Solicitation must be sent to all firms on the qualified list and on the source list.

**FAR 9.206-1(e)**

Any solicitation issued must allow sufficient time consistent with delivery requirements for new sources to become qualified by the requiring activity.

### **6.3.2 Forward Requests for Information**

The names and addresses of any concerns

- responding to a presolicitation notice or
- requesting a copy of the solicitation

should be directed to the requiring activity for consideration. Offerors, who can satisfactorily demonstrate that they can meet the standards established for qualification, can be considered for award even if they are not shown on the qualified list. The requiring activity will assist interested concerns in meeting these standards.

### **6.3.3 Screen Offers against Qualified List**

Offerors are required to identify in their bid or proposal if they have been qualified. Concerns not listed on the qualified list must also present evidence of qualification with their offers in order to receive consideration.

**FAR 52.209-1**

- For **IFBs**, bids will be rejected as nonresponsive if the bidder does not indicate they either are qualified or are currently being evaluated by the reviewing activity.
- In the case of **negotiations**, offerors should be given an opportunity to become qualified after the closing date if delay of an award would not harm the Government.

## SOURCE LISTS

### **6.3.4 Report Conditions for Removal**

FAR 9.207

The contracting officer shall report to the requiring activity any conditions which merit a source be removed from a qualified list for any of the following reasons:

- Failure to meet qualification requirement.
- Rejected defects not corrected.
- No reevaluation upon change of offeror's location or ownership.
- Discontinuance of product by manufacturer.
- Source requests removal.
- Condition of meeting qualification was violated.
- Revised specification imposes new qualification requirement.
- Manufacturing/design changes to the qualification requirement.
- Source listed on Parties Excluded from Procurement Programs.
- Performance under contract is otherwise unsatisfactory.

The agency responsible for managing the QPL must notify affected sources promptly of any removal from a qualified list including reasons for removal.

## CHAPTER 7

# SET ASIDES AND 8(a) PROGRAM

### OPPORTUNITY KNOCKS

*The acquisition history you are reviewing shows the requirement for medical supplies has been awarded to large businesses for the past two years. Your Small and Disadvantaged Business Utilization Specialist (SADBUS) has recommended that you set aside the requirement for medical supplies exclusively for small business because she has a list of small businesses that can provide the supplies.*

- 1. What are the requirements for set-asides?*
- 2. How many firms are capable of fulfilling this requirement?*
- 3. Can you override the recommendation for set-aside?*

## **COURSE LEARNING OBJECTIVES**

At the completion of this course, you should be able to:

**Overall:**     Make a set-aside decision.  
                  Determine whether to meet the requirement through an 8(a) contract.

**Individual:**

### **SET-ASIDES**

- 7.1.1 Determine if the requirement has already been set-aside.
- 7.1.2 Identify the number and capabilities of firms eligible for set-asides.
- 7.1.3 Make set-aside decisions.
- 7.1.4 Respond to SBA appeal of set-aside decision (if any).
- 7.1.5 Include set-asides in CBD and select provisions for solicitation.

### **8(a) SET-ASIDES**

- 7.2.1 Identify potential 8(a) sources of supply.
- 7.2.2 Determine the capability of potential 8(a) sources to meet the need.
- 7.2.3 Determine the type of set-aside.
- 7.2.4 Select applicable clauses for the contract.

# INTRODUCTION FOR ESTABLISHING SET-ASIDES

## Small Business Act

FAR 19.201

The Small Business Act of 1953, as amended:

- Created the Small Business Administration (SBA).
- Established Congressional policy that a fair proportion of total purchases by the Government should be placed with small businesses.
- Empowered the Administrator of SBA to certify the capacity and credit of small businesses for the purpose of performing Government contracts.

## Set-aside

Acquisitions reserved exclusively for small business or small disadvantaged business concerns, and/or businesses in labor surplus areas.

A **small business concern** is a firm that is:

FAR 19.001

- Organized for profit;
- Independently owned and operated;
- Not dominant in the field in which it is bidding on Government contracts; and
- Conforms to specific industry criteria defined by the SBA on an industry-by-industry basis.

A **small disadvantaged business concern** is a small business that is:

- At least 51 percent unconditionally owned by one or more individuals (including individuals of economically disadvantaged Indian Tribe or Native Hawaiian origin) who are both socially and economically disadvantaged, or
- Publicly owned by a minimum of 51 percent socially and economically disadvantaged individuals and is controlled by one or more such individuals.

A **labor surplus area concern** is a firm that is:

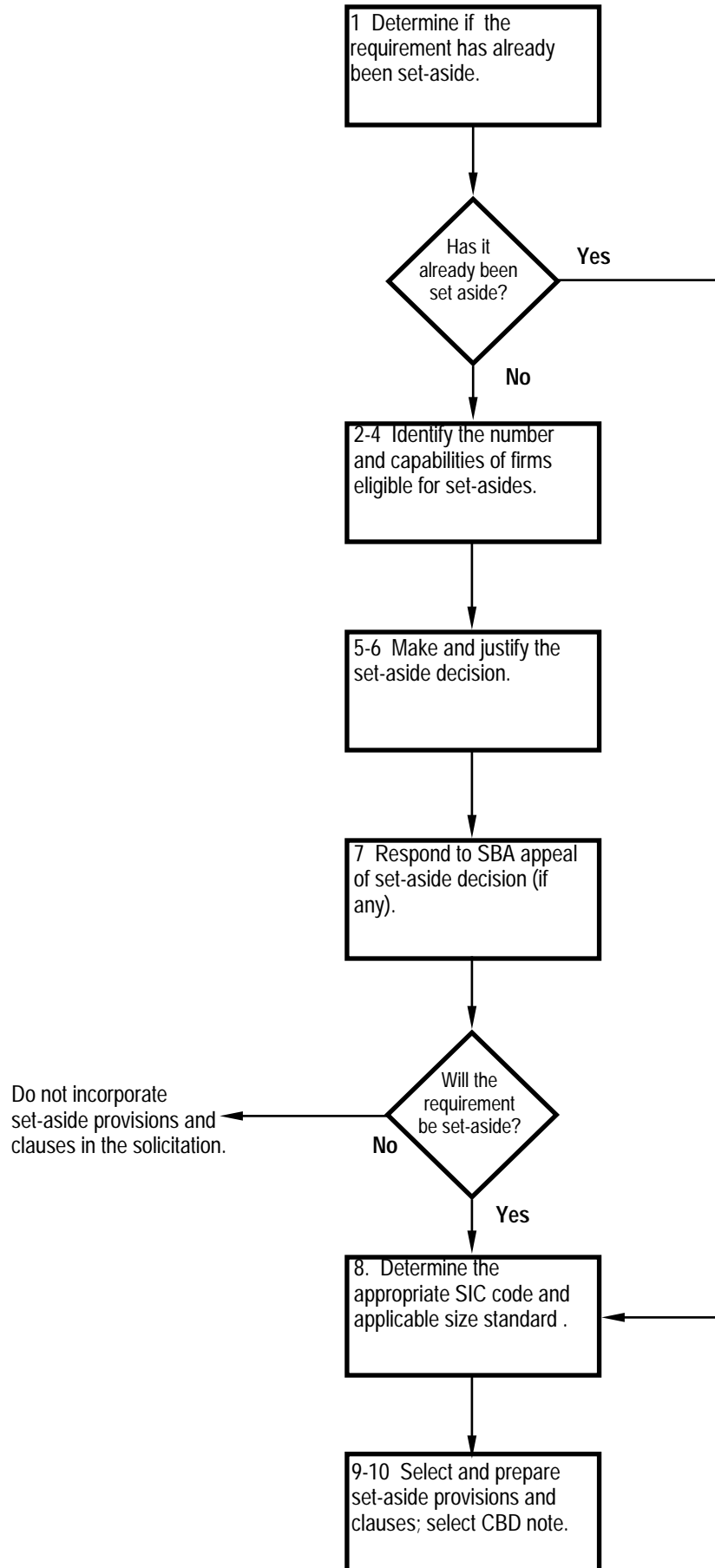
FAR 20.101

- Located in an area of concentrated unemployment or underemployment.

## SET-ASIDES

<b>Purpose of Set-asides</b>	<p>Agencies establish set-aside programs to achieve their small business goals either on a case-by-case or on a “class” basis (e.g., all purchases of a given commodity). Decisions to set-aside all or a part of a given acquisition may involve:</p> <ul style="list-style-type: none"><li>• Representatives of the Small Business Administration,</li><li>• Representatives of the requiring activity,</li><li>• Small business specialist in the contracting office, and</li><li>• Contracting officer.</li></ul>
<b>Steps in Performance</b>	<p>The steps in establishing set-asides are charted on the next page. Following the flowchart each step is discussed in turn.</p>

# STEPS IN ESTABLISHING SET-ASIDES





## STEPS IN ESTABLISHING SET-ASIDES

### 7.1 SET-ASIDES

For every procurement exceeding \$25,000, you will either set it aside for small business or make it available for review by your SBA procurement center representative. Determinations to set-aside made by the Contracting Officer are considered unilateral set-asides.

#### 7.1.1 Determine if Requirement has Already been Set-aside

FAR 19.501(d)

Your market research, and in particular, any acquisition histories will identify whether previous, similar requirements were set-aside. The file may show one of the following types of set-asides for small business and/or labor surplus areas:

- **Specific procurement:** A requirement that was a first-time buy or one that had not been set-aside previously for small businesses.
- **Class Set-aside:** The reserving of a class or portion of acquisitions of products or services to be placed with small business concerns.
- **Repetitive Set-aside:** Acquisitions for the same products or services that have been reserved consistently for small business entities.

#### Small Business Competitiveness Demonstration Program

You must determine if the requirement falls under the Small Business Competitiveness Demonstration Program. This program, to be conducted January 1, 1989, through December 31, 1992, was established by the Business Opportunity Development Reform Act of 1988 to:

FAR 19.1003

1. Test the ability of small businesses to compete successfully without the benefit of set-asides in four designated industry groups:
  - Construction (Major Groups 15, 16, and 17)
  - Refuse systems and related services (SIC 4212, 4953)
  - Architectural and engineering services (SIC 7389, 8711, 8712, 8713)
  - Nonnuclear ship repair
2. Measure awards made to Emerging Small Business (ESBS) - small business less than 50% of the small business size standard (e.g., 249 employees when 500 is the standard)
3. Set aside all requirements with an estimated value equal to or less than the amount established by OFPP to ESBS in the four designated groups when competition exists.

4. Expand small business participation in ten target industry categories. There are ten agencies participating in this program:

1. Department of Agriculture
2. Department of Defense
3. Department of Energy
4. Health and Human Services
5. Department of Interior
6. Department of Transportation
7. Veterans Administration
8. Environmental Protection Agency
9. General Services Administration
10. National Aeronautics Space Administration

Each participating agency designates its own industry category after coordinating with SBA. Check your agency regulations to determine if this program applies to your requirement.

#### Changes in Previous Set-Aside

Even though there may have been a previous set-aside for a similar procurement, you are required to analyze the current market conditions to determine if there have been any significant changes, such as:

- **Competition no longer exists:**
  - small businesses have been purchased by large business
  - small business has outgrown its size standard
  - small business no longer exists
  - place of performance is no longer a labor surplus area.
- **Product has changed** and availability from small businesses is unknown.
- **Justifications are obsolete** that were used for class, repetitive, or 8(a) set-asides.

If the conditions have not changed, you must set-aside the procurement for small business.

If the conditions have changed or this is a first-time procurement, you will need to proceed as indicated in the following sections.

## SET-ASIDES

### 7.1.2 Identify Firms Eligible for Set-Asides

You cannot set-aside any procurement until you can demonstrate that , at a minimum:

FAR 19.502-2

1. Offers will be obtained from at least two responsible concerns meeting the criteria for the type of set-aside (small business, large business on non set-aside portion, and/or businesses performing in labor surplus areas).
2. Offerors can provide products (if supply) manufactured by concerns meeting the criteria for the type of set-aside (unless specifically waived by SBA).
3. Award will be made at fair market prices.

There are four steps involved in identifying the number of firms eligible for set-asides:

FAR 19.303

STEP 1: You must first determine the

- Standard Industrial Classification (SIC) code, and
- Corresponding small business size standard applicable to the procurement.

FAR 19.102(g)

Standard Industrial  
Classification Manual

**SIC codes** are published by the Office of Management and Budget in the Standard Industrial Classification Manual and are determined by the type of items or services being solicited. The SIC manual is intended to cover the entire field of economic activity. It classifies and defines activities by industry categories. For example, classifications are categorized by:

1. Divisions (i.e., Division A: Agriculture, Division C: Construction, Division D: Manufacturing, Services, etc.)
2. Major Groups within the division (i.e., Major Group 20: Food and Kindred Products, Major Group 31: Leather and Leather Products, Major Group 81: Legal Services)
3. Industry Classifications within a major group (i.e., SIC 2047, Dog and Cat Food; SIC 3111 Leather Tanning and Finishing, SIC 8111 Legal Services, etc.)

The manual describes each of the categories.

**Multiple Classifications** There can only be one classification for any product/service. When more than one could apply, select the one whose definition best describes the principle nature of the product or service. Where more than one item or service is solicited, the procurement should be classified according to the item or service that constitutes the greatest percentage of the contract price.

**FAR 19.101**

**Size standards** are established by SBA on an industry-by-industry basis. The standards are based on either the

- number of employees in a company, or
- annual receipts of a company.

**Standards Based on Number of Employees**

The number of employees is a measure of the average employment of a business concern which includes:

1. employees of domestic and foreign affiliates
2. employees on a full-time, part-time, temporary or any other basis
3. employees during the pay periods of the preceding 12 months (or the period in existence if less than 12 months)

**Standards Based on Dollars**

When a standard is based on a dollar amount, the annual average gross revenue of the concern over the last three years (or total receipts when less than three years exists) is used.

Gross revenue includes the total income from:

- sales of products and services
- interest
- rents
- fees
- commissions, and
- any other income producing sources

after subtraction of:

- returns and allowances
- sales of fixed assets
- interaffiliate transactions
- taxes collected for remittance to a third party

Generally, revenues shall be measured as entered on the regular books of account acceptable to the U.S. Treasury for the purpose of supporting Federal income tax returns.

## SET-ASIDES

Once you have determined the SIC code, the corresponding small business size standard can be found in the FAR. Examples are provided in Exhibit 7-1.

EXAMPLES OF SIZE STANDARDS ESTABLISHED BY SBA		
<u>SIC CODE</u>	<u>DESCRIPTION</u>	<u>SIZE</u>
1781	Water Well Drilling	\$7.0 Million
4971	Irrigation Systems	\$3.5 Million
4491	Marine Cargo Handling	\$12 Million
2273	Carpets and Rugs	500 People
5191	Farm Supplies	100 People
4513	Air Courier Services	1,500 People

*Exhibit 7-1*

Locating Potential  
Eligible Firms

STEP 2: Identify potential small business or labor surplus area firms from sources.

FAR 19.202-2

You must make every reasonable effort to find additional small business and labor surplus area concerns.

Small Business Con-  
cerns: Supplies

When locating potential small business firms for supply requirements conforming to the size standard, concentrate your efforts on the manufacturers for the items. Any set-aside decision must be made on the basis of:

- two or more small business firms
- which manufacture the product in the U.S. and
- are willing to produce the product in connection with this acquisition.

FAR 19.202-2(f)

A manufacturer is the concern which with its own forces, transforms raw material, miscellaneous parts or components, into the end item. There can only be one manufacturer of the end item for size determinations.

Nonmanufacturers

The size standard established by SBA for the industry is based on the manufacturer and is not to be applied to any nonmanufacturer of the product. A nonmanufacturer is:

FAR 19.102(f)

"any concern which submits an offer in its own name but proposes to furnish a product which itself did not manufacture."

Nonmanufacturers include:

1. A concern that regularly sells the product manufactured by another firm (regular dealer)
2. A concern which purchases items and packages them into a kit.
3. A manufacturer which also can produce the product but does not do so in connection with the acquisition.

Under a set-aside or 8(a) procurement, nonmanufacturers must provide products that were manufactured in the United States by a regular dealer primarily engaged in wholesale or retail trade that meets the SBA size standard for the industry. SBA waives the requirement, either by class or individual case, when it has determined there are no small businesses for products in a class and nonmanufacturers are regular dealers.

Size Standard for  
Nonmanufacturer

While nonmanufacturers are not prohibited from bidding on set-asides for supply requirements, the size standard used for them is always **500 employees**.

Small Business Con-  
cerns: Services

Locating sources for services is based on the standards established by SBA for that industry. Generally, size standards for services are shown in dollar values. Only firms meeting the size standards that would be likely to submit an offer to perform the services themselves should be identified for set-aside decisions. Suppliers who provide products to an offeror are not required to be a small business.

Handicapped Organiza-  
tions

For the period FY 1989 through FY 1993, public and private organizations for the handicapped are authorized to participate in acquisitions set-aside for small business unless a small business which experiences (or is likely to experience) severe economic injury has successfully

## SET-ASIDES

appealed the award to SBA.

While handicapped organizations may be authorized to participate, they cannot be counted as qualified firms when making any set-aside decisions.

### Agency Assistance/ SADBU

**FAR 19.201(c)**

Each agency with contracting authority is required to establish an Office of Small and Disadvantaged Business Utilization (SADBU). This is an excellent place to start when attempting to locate potential small businesses. The SADBU serves as the agency focal point for interfacing with Small Business Administration.

### SBA's Role

The Small Business Administration also provides assistance to agencies with contracting authority through:

- FAR 19.402 • Procurement Center Representatives
- FAR 19.403 • Breakout Procurement Center Representatives

### Labor Surplus Area Concerns

**FAR 20.101**

Labor Surplus Area Concerns: Supply Requirement. In addition to locating businesses which meet size standards, you need to locate potential sources for supplies whose place of performance is located in a labor surplus area. Performance is substantially in a labor surplus area if the costs incurred for manufacturing, production, or performance in the labor surplus area exceed 50% of the contract price.

Labor Surplus Area Concerns: Service Requirement. Labor surplus area considerations do not impact service contracts where the performance is the same for all bidders. For example:

Any firm awarded a contract for janitorial services would be performing on-site. Therefore, all offerors would identify the same location as the place of performance.

### LSA List by Zip Codes

The Department of Labor issues the labor surplus area list on a fiscal year basis. GSA, in turn, issues a list of all zip codes in the nation which are in labor surplus areas. Make sure when locating potential sources you determine the zip code for the firm's place of performance since it may not always be the same as the mailing address.

If the services were to be performed at the contractor's location, then you must consider labor surplus areas when making a set-aside decision.

Exhibit 7-2 identifies other sources for locating Small Business and

labor surplus area concerns:

### **SOURCES FOR LOCATING POTENTIAL SMALL BUSINESS AND LABOR SURPLUS AREA CONCERNS**

<b>Source Lists/Solicitation Mailing Lists</b>	Contains suppliers, size standards, SIC codes, and commodities/services. The address of the company may not be the place of performance, therefore, determining labor surplus areas is difficult.
<b>PASS</b>	The SBA Procurement Automated Source System matches key data about small businesses against requirements for future Government procurements to determine the most acceptable firms that may be asked to prepare a bid or proposal for the procurement.
<b>Government Contract Specialists</b> (also, technical representatives and requiring activity personnel)	Can provide you with the best leads to match the requirement.
<b>Contract Office Files</b>	Generally, these files contain historical data and a reasonable number of small business sources.
<b>Vendor Files</b>	Can provide you with names of suppliers who are capable of fulfilling the requirement.
<b>Small Business Technical Advisor</b>	Maintains a current list of small, women-owned, disadvantaged, and labor surplus area concerns SIC codes, and commodities/services.
<b>Market Surveys</b>	Identifies size standards, place of performance, new suppliers, and commodities/services.
<b>Advertisements</b>	Specific needs can be specified to draw the sources that will meet your needs.
<b>Synopses</b>	A notice in the CBD may locate new and/or additional sources that meet your needs.
<b>Trade Associations</b>	Can provide new and/or additional sources.

*Exhibit 7-2*



## SET-ASIDES

FAR 19.501(g)

STEP 3: Determine whether the firms you have identified as small business and/or labor surplus area can provide the product or service that meets your needs at a fair market price.

You will need to research and analyze market data (See Chapter 3) to determine each firm's ability to:

- Comply with the technical specifications of the requirement,
- Ensure compliance with quality requirements,
- Deliver in accordance with your schedule,
- Provide fair and reasonable price, and
- Meet general standards of responsibility (has the necessary product and financial capabilities).

First, you should consider for your set-aside determination only those firms that have the capability to perform. Second, you must consider the firms' business size and place of performance. Any decision based on incomplete information could cause significant problems later in the acquisition process.

STEP 4: Select one of the following programs that best meets the Government's needs:

FAR 13.105

### **1. Small Business-Small Purchase**

This category "automatically" reserves all purchases for competition among small businesses when the purchase:

- is not expected to exceed \$25,000, and
- is subject to small purchase procedures.

FAR 19.502-2

### **2. Total Set-Aside**

The basic rule governing total set-aside is the "rule of two." Under this rule, the entire amount of an individual acquisition is set aside if you determine there is a reasonable expectation that:

- offers will be obtained from at least two responsible small business concerns, and that

- awards will be made at fair market prices.

FAR 19.502-3

### 3. Partial Set-Aside

Partial set-asides may be established when a total set-aside is not appropriate and the requirement can be divided into two or more economic production runs or lots. At least one small business must be able to furnish one or more lots at fair market prices. Partial Set-Asides may not be made if there is a reasonable expectation that only two offerors (one large and one small) with the capability to perform will respond..

FAR 20.201

### 4. Labor Surplus Area (LSA)

Set-asides may also be made for the purpose of aiding LSA. Under this program, you may award a set-aside procurement to an LSA concern whether it is a small or large business. You may also, except for DOD, restrict set-asides to small businesses within the LSA. (DOD has some restrictions on LSA set-asides when a price differential is involved.)

FAR 19.501(a)

### 5. Total Small Business/Labor Surplus Set-Aside

Under this set-aside, you may award only to a firm that is eligible as both small business and labor surplus area for all requirements. Rule of two applies.

### 6. Partial Small Business/Labor Surplus Set-Aside.

Under this program, you may award only to a firm that is eligible as both small business and labor surplus area for the set-aside portion. While only one eligible firm is required for the set-aside portion, there must be a reasonable expectation more than two capable firms (one large and one small) will respond.

Order of precedence

The set-aside program order of precedence is:

FAR 19.504

1. Total Small Business/Labor Surplus
2. Total Small Business only
3. Partial Small Business/Labor Surplus Set-Aside
4. Partial Small Business only
5. Total LSA only

## SET-ASIDES

### 7.1.3 Make and Justify Non-Set-Aside Decision

☞ **NOTE:** DoD set-aside order of precedence is different. Check your agency procedures for the amount of documentation necessary when you set-aside a procurement.

1. Contracting officers may make unilateral decisions to set-aside requirements for small business and/or labor surplus areas; or
2. SBA procurement center representatives can recommend a procurement for set-aside for small business. (If you concur, it becomes a joint set-aside.)

FAR 19.505(a)

If you do not agree with an SBA recommendation to set-aside a procurement to small business, you must prepare a justification and furnish it to your SBA procurement center representative within 5 business days. This notification also applies to the withdrawal or modification of a set-aside decision.

Some agencies, GSA for example, have developed forms and procedures to streamline the SBA notification process by making a formal "non set-aside" decision for each procurement it makes available to the SBA for review. The decision is reviewed and concurred by the SADBUE before submission to the SBA procurement center representative.



☞ **NOTE:** Determinations not to set-aside for labor surplus areas must be approved in accordance with your agency procedures. The SADBUE representative has the authority to make LSA set-aside recommendations as well.

### 7.1.4 Respond to SBA Appeal

After receipt of your written notice, the SBA procurement center representative may appeal to the head of the contracting activity and in

SET-ASIDE APPEAL PROCESS			
Action Officer	If	Then	No. of Days
SBA Proc. Center Rep (PCR)	Disagrees with recommendation not to set-aside	<ul style="list-style-type: none"> <li>• Appeals to Head of Contract Activity (HCA)</li> <li>• Contracting Officer suspends action on acquisition</li> </ul>	2
HCA	Receives the appeal from the Small Business Procurement Center Representative (PCR)	Renders decision and sends to SBA	7
SBA (PCR)	Disagrees with HCA decision	<ul style="list-style-type: none"> <li>• Directs Contracting Officer to further suspend action</li> <li>• SBA procurement center representative submits to SBA Administrator for further action</li> </ul>	1
SBA (Administrator)	Receives the appeal from the SBA Procurement Center Representative	May appeal to the Agency Head	15
Agency Head	Receives an appeal from SBA Administrator	<ul style="list-style-type: none"> <li>• Obtains justification from Contracting Officer (and SADBUE)</li> <li>• Issues a final decision</li> </ul>	30

*Exhibit 7-3*

### 7.1.5 Include Set-asides in CBD and Provisions in Solicitation

turn to the agency head. Exhibit 7-3 outlines the appeal process. Once you have determined to set-aside procurements, you will need to

**FAR 19.202-2**

1. Encourage maximum participation through:
  - full utilization of mailing lists
    - list to include all established and potential small business and LSA sources that have submitted acceptable applications or appears qualified from other representations)
  - contacting SBA procurement center representatives, and
  - synopsisizing in the CBD. (be sure to select the appropriate

## SET-ASIDES

FAR 19.304

Numbered Note for your type of set-aside.

2. Include appropriate set-aside provisions in your solicitation:
  - Small Business Concern Representation.
  - Small Disadvantaged Business Concern Representation.
  - Women-Owned Small Business Representation.
  - SIC Code and Small Business Size Standard.

Exhibit 7-4 summarizes establishing set-asides.

STEPS IN ESTABLISHING SET-ASIDES	
IF SET-ASIDE IS...	THEN
Existing	Determine if conditions are current.  Select applicable provisions and clauses, and CBD note.
First time	Determine appropriate SIC code and size standard.  Identify the number and capabilities of firms eligible for set-asides.  Select set-aside that best meets Government's needs.  Make and justify non-set-aside decision, if any.  Respond to SBA appeal of non-set aside decision, if any.  Select applicable provisions and clauses, and CBD note.

*Exhibit 7-4*

## INTRODUCTION FOR 8(a) PROCUREMENTS

### 8(a) Set-asides

FAR SubPart 19.8

FAR 19.809-1

The title "8(a)" derives from Section 8(a) of the Small Business Act of 1953, as amended. The 8(a) program is designed to assist socially and economically disadvantaged individuals in obtaining a share of the federal procurement dollar. Through this program, the Government enters into contracts with the SBA, and SBA subcontracts the work to an eligible 8(a) firm, a 3-party contract which contains the signature of the SBA and SBA's contractor and the agency contracting officer.

### Who is Eligible to Participate?

There are six fundamental criteria which must be met before a firm can be approved to participate in the 8(a) program:

1. Be a small business concern that is at least 51 percent owned and controlled by economically and socially disadvantaged persons;
2. Be U.S. citizens;
3. Be able to benefit from the assistance available from SBA (e.g., marketing, technical, financial, management, and contractual);
4. Establish a fixed program participation term, during which it will strive to achieve its business plan objectives;
5. Demonstrate that federal contracts are available to support their business plan and prove their eligibility for the program;
6. Be screened by SBA to ensure conformity with program requirements.

### Definitions

FAR 19.001

#### **Socially disadvantaged:**

"Individuals who have been subjected to racial or ethnic prejudice or cultural bias without regard to their qualities as an individual."

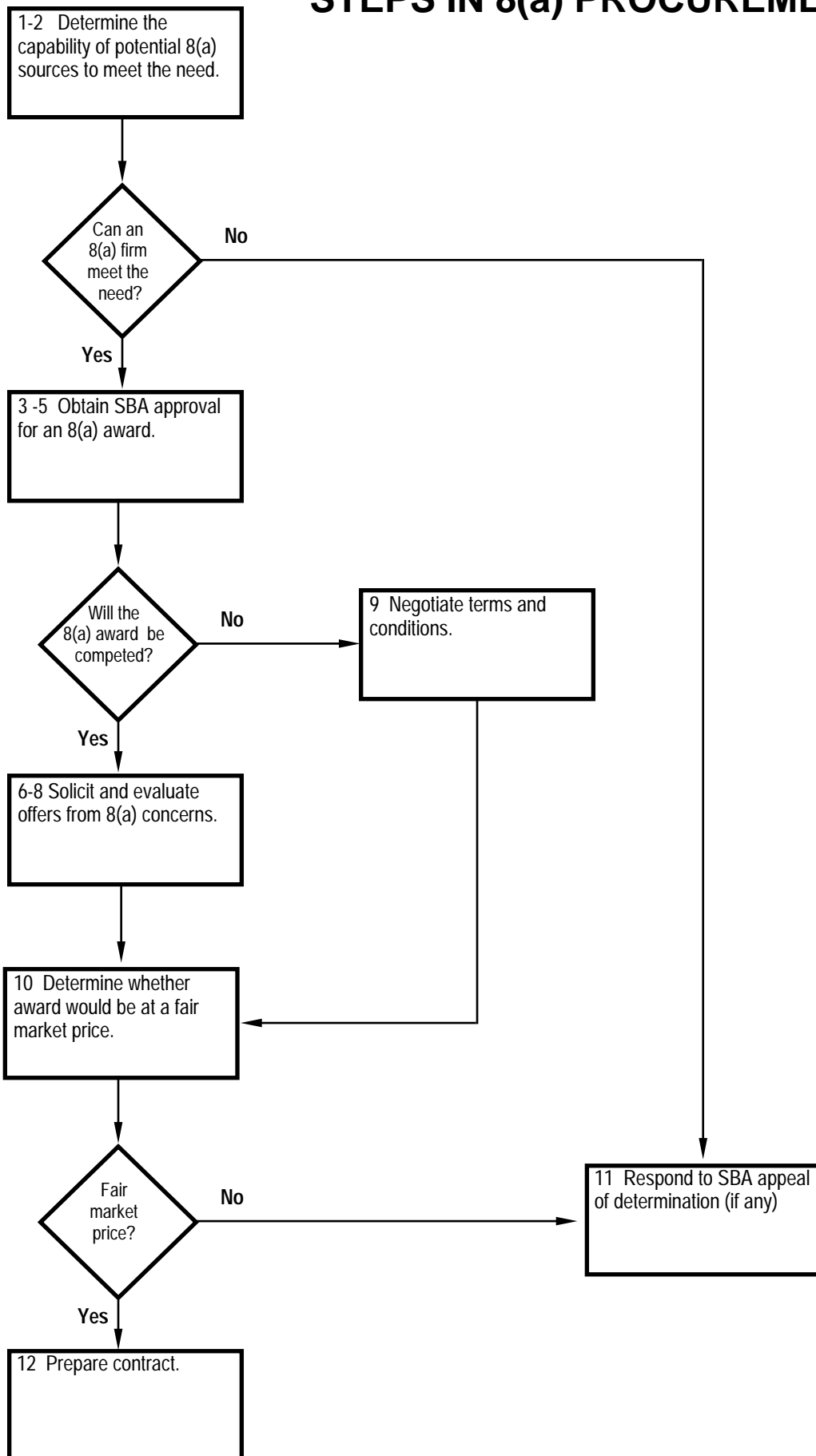
#### **Economically disadvantaged:**

"Individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities."

### Steps in Performance

The steps in establishing 8(a) procurements are charted on the next page. Following the flowchart each step is discussed in turn.

# STEPS IN 8(a) PROCUREMENTS



## STEPS IN 8(A) PROCUREMENTS

### 7.2 8(a) SET-ASIDES

#### 7.2.1 Identify Potential 8(a) Sources of Supply

One type of a total small business set-aside is the 8(a) program since only small businesses can be considered. Keep a lookout for potential 8(a) firms when locating sources for the set-aside determination. SBA has published directories containing profiles of 8(a) contractors to help you locate sources.

#### 7.2.2 Determine Capability of Potential 8(a) Sources

After you have located potential 8(a) sources, determine if the firms are capable of fulfilling the need. 8(a) contractors are capable of performing virtually every type of manufacturing, service, and construction contract.

If you require more information than is shown in the SBA 8(a) directory profile, you may ask the firm to provide an oral presentation to technical and procurement personnel. The presentation does not obligate an agency to set-aside a proposed procurement; however, it is a method of determining the capability of a potential 8(a) contractor.

Certain standards of responsibility that an 8(a) firm must meet are listed in Exhibit 7-4.

STANDARDS OF RESPONSIBILITY
<ul style="list-style-type: none"> <li>• Be able to comply with required or proposed delivery/performance schedule;</li> <li>• Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; and</li> <li>• Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.</li> </ul>

*Exhibit 7-4*



## SET-ASIDES

### 7.2.3 Determine the Type of Set-Aside

The two types of programs are described in Exhibit 7-5.

FAR 19.805-1

SET-ASIDES AND REQUIREMENTS	
Type of Set-aside	Requirements
8(a) Competitive	At least two offerors from 8(a) firms; award will be at fair market prices; and contract price, including options, will exceed \$5,000,000 for manufacturing SIC codes and \$3,000,000 for other acquisitions. This action must be publicized in the Commerce Business Daily.
8(a) Noncompetitive (Sole Source)	Exceeds 8(a) competitive threshold and: (1) Expects offer from only one 8(a) firm, or (2) Eligible 8(a) firm is owned and controlled by an economically disadvantaged Indian tribe.

*Exhibit 7-5*

### 7.2.4 Select Applicable Clauses

After you have selected the type of 8(a), don't forget to include the appropriate clauses in the contract:

FAR 19.811-3

- Special 8(a) Contract Conditions.
- Special 8(a) Subcontract Conditions.
- Section 8(a) Award.
- Notification of Competition Limited to Eligible 8(a) Concerns.
- Limitations on Subcontracting.

# CHAPTER 8

## COMPETITION

### FACT OR FICTION

*Today you received a PR for 50 X-ray security screening systems estimated at \$750,000. The requiring activity is requesting a sole source award to RT X-Ray Inc. within 10 days. Your questions to the program office are:*

- 1. Is competition restricted just because this is the only known source or is this a classified requirement that would permit the use of the national security authority?*
- 2. What type of justification is needed for a sole source procurement?*
- 3. Are you required to synopsise this contract action?*

## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

**Overall:** Determine whether to conduct full and open competition after exclusion of sources.

Determine whether to conduct other than full and open competition.

**Individual:**

8.1 Determine whether other than full and open competition is justified.

8.2 Determine whether to exclude sources.

8.3 Determine whether a Justification & Approval (J&A) or Determination & Finding (D&F) is required.

8.4 Prepare the J&A or D&F and obtain approvals.

8.5 Determine if a synopsis is required.

# INTRODUCTION TO COMPETITION

## Competition in Contracting Act

In 1984, Congress passed the Competition In Contracting Act (CICA) which provides for Executive Agencies to use "competitive procedures" in acquiring property and services. Competitive procedures are the procedures under which an agency enters into a contract pursuant to "full and open competition." CICA also excepted certain categories of procurements from its competitive requirements. Among these exceptions were seven categories of circumstances which require written justifications by the contracting officer, management approvals at certain dollar levels, and public notice as appropriate to the particular circumstances.

## Definitions

FAR 6.003
-----------

Full and open competition means that all responsible sources are permitted to compete for Government contracts. In other words, competition allows all qualified contractors an equal opportunity to win a contract.

Other than full and open competition (restricting or limiting competition) means contracting without providing for full and open competition.

Sole source acquisition means a contract action that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

Justification and approval means a document that contains the circumstances, rationale, and authority for using other than full and open competition and approval is made by an appropriate official.

## Policy

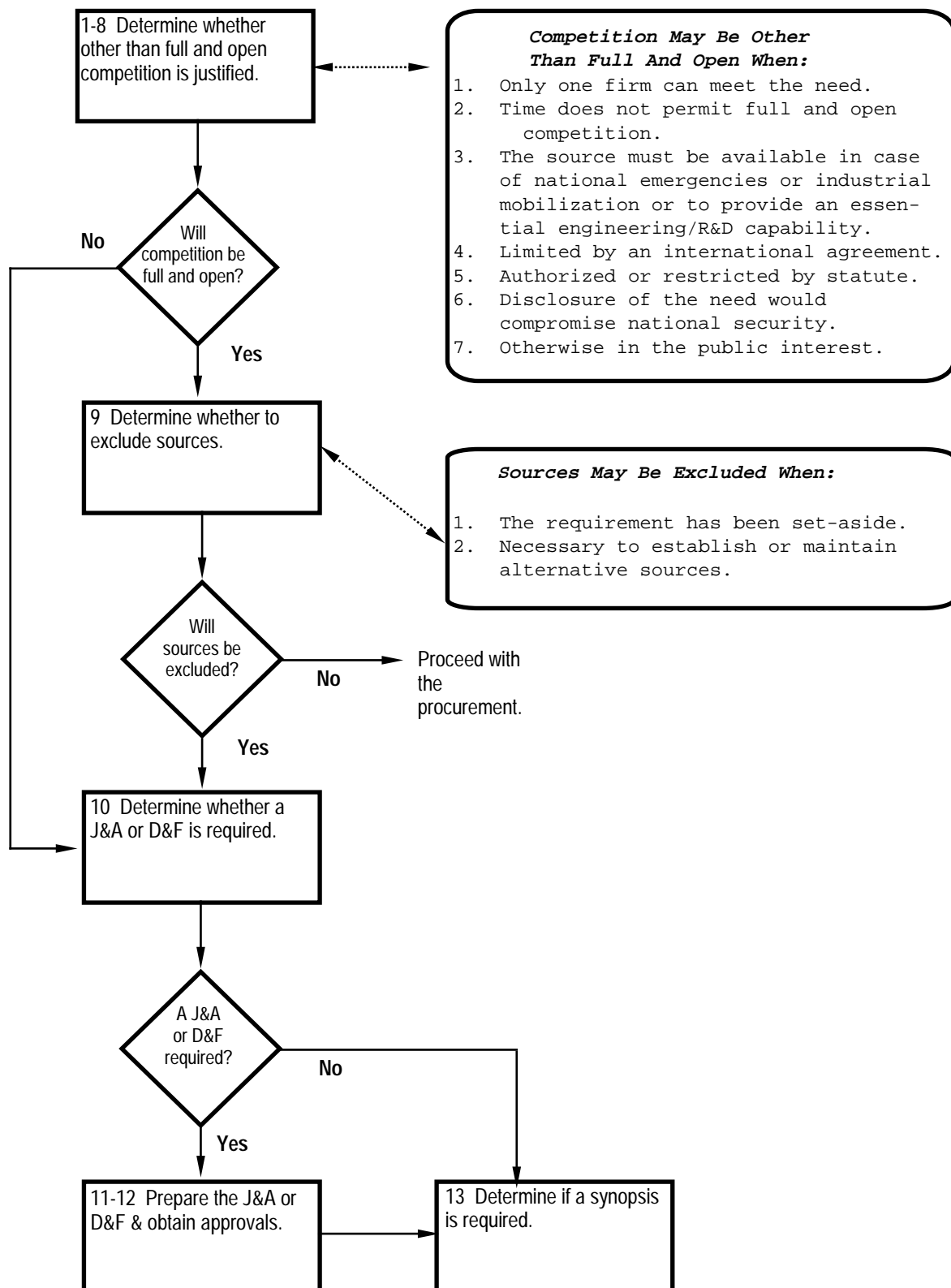
FAR 6.101
-----------

Contracting officers are responsible for promoting full and open competition in all solicitations and contracts through the use of the competitive procedures that best meets the needs of the Government.

## Steps in Performance

The steps in determining the extent of competition are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN DETERMINING THE EXTENT OF COMPETITION



## STEPS IN DETERMINING THE EXTENT OF COMPETITION

### 8.1 Determine if Other than FAOC is Justified

You are required to promote competition to the fullest extent practicable using full and open competition unless otherwise justified. Understanding what constitutes full and open competition is necessary in determining if other than full and open competition procedures should be justified.

Full and open competition is determined to have happened when:

1. The Government's intent to procure is known to the public:
  - published in the CBD or authorized alternative,
  - announced to all sources on mailing lists and
  - to those concerned identified through market research
  - sources sought synopsis or equivalent are not used as the only announcement to the public
2. The public is given sufficient information as to what the Government's needs are; and
3. The Government invites all interested parties to compete and indicates a solicitation will be provided to them.

The issuance of a complete solicitation to more than one potential offeror, in and of itself, does not necessarily make a procurement full and open competition. The critical issue in this case is whether:

**All potential offerors were made known of the requirement and given an opportunity to submit offers.**

In fact, multiple parties may not necessarily need a complete solicitation document to make a procurement full and open competition. The critical issue in this case is whether:

**All potential offers were given sufficient information and an opportunity to compete for what the Government's needs are.**

A complete solicitation would have to be provided when more than one firm responds to your attempts to publicize the requirement.

Even if only one firm is received (or if only one firm was even expected to be received), the requirement for full and open competition has been met as long as all potential sources are provided an opportunity to submit

## COMPETITION

### Look at the Process

an offer. The law does not require the contracting officer to justify the actual response of the market place; however, attainment and maximization of competition is imposed in other ways. The concept of full and open competition relates to the process by which the contracting officer requests the private sector to respond to the Government's requirement.

FAR 14.407-1

Although the contracting officer may have evidence of limited competition to justify the application of an exception to the use of competitive procedures (item is available from only one responsible source and no other type of property or service will satisfy the agency's need), nothing prohibits the contracting officer from using full and open competitive procedures. The contracting officer has an affirmative duty to question using competitive procedures that result in less than three offers. The contracting officer is required to take appropriate action to facilitate future competition.

**Will the procurement be known to the public and will solicitations be made available to all interested offerors; or**

**Will only a select few be made aware of the procurement or provided a copy of the solicitation?**

Which question results in an affirmative answer will go a long way in determining if the procurement will be full and open competition.

At times, the requiring activity may

- only identify one source for the procurement,
- request a specific firm(s) not be considered for award, or
- have legitimate reasons for restricting the competition.

### Certification of Technical Restrictions

The technical or requirements personnel are required to provide certification when technical or requirements data form a basis for noncompetitive procedures. With or without the certification, it is up to you to determine the intent of the requester. Is their request legitimate?

FAR 6.303-2(b)

If you determine that the requiring activity has not adequately justified its recommendation or if your actions have identified additional responsible sources, you will need to advise the requiring activity that you will utilize full and open competition (FAOC) procedures.

However, if you agree that competition should be restricted or limited, the use of procedures permitting "other than full and open competition" can be authorized. Exhibit 8-1 provides policy guidance on the use of other than full and open procedures.

**OTHER THAN FULL AND OPEN COMPETITION****FAR 6.301**

- One of seven statutory exceptions must be cited:
  1. Only one responsible source.
  2. Unusual and compelling urgency.
  3. Industrial mobilization; or engineering or R & D capability.
  4. International Agreement.
  5. Authorized or required by statute.
  6. National security.
  7. Public interest.
- Cannot be justified on basis of lack of advanced planning or the availability of funds.
- Offers shall be solicited from as many potential sources as practicable.

*Exhibit 8-1***FAR 6.302**

Each of the seven authorities which permit contracting without providing for full and open competition is described below. While the requiring activity is generally required to support any determination, it is up to you to identify the authorizations and process the necessary paperwork.

**Only One Responsible Source**

If the purchase request identifies only one source, other than full and open competition may be authorized when:

"the supplies or services required by the agency are available from only one responsible source, or for DOD, NASA, and the Coast Guard from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements."

Some situations that may apply to this authorization are:

- Unsolicited research proposals
- Follow-on contracts for specialized major system
- Unique supplies/services and/or supplier(s)
- Limited data rights, patents, etc.
- Utilities
- Supplies are established as standard
- Brand name descriptions (brand name only) even when dealers and manufacturer can submit offers.



## COMPETITION

### **FOR EXAMPLE:**

The requiring activity has stated only one manufacturer's vehicles are acceptable for delivery to a remote location in Alaska. Their justification is based upon the severely limited access to repair and maintenance services available in that location. The nearest "town" is over 1,000 miles away. The requisitioning agency has standardized their fleet in that location for only those manufacturer's vehicles. Using full and open competition could result in the requisitioner receiving vehicles that cannot be serviced.

It is much better to justify the "one responsible source" than to cause the activity insurmountable problems after delivery. In this case, only the one responsible source should be considered.

---

### Unusual and Compelling Urgency

If the purchase request or subsequent documentation specifies that the requirement is urgently needed, this authority may be used when it can be demonstrated that:

"the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."

Some situations that may apply to this authorization are:

- Earthquake or Flood
- Other natural disasters
- National or world events

### **FOR EXAMPLE:**

The President has issued a state of emergency due to flooding in several states. Your agency has been authorized to purchase mobile homes for use by the emergency workers in those states. Since the need for the mobile homes would be immediate, lead times necessary for permitting full and open competition would unduly delay delivery .

In this case, the need for the requirement is so compelling that it is best to forego the competitive procedures in order to act timely.

## FAR 7.103(a)

☞ **NOTE:** You will need to be able to determine that neither the pending expiration of funds nor lack of advance planning is the real reason for this urgency. If either is the case, this authorization cannot be cited.

(For instance, an agency's supply of items has run out or a machine needs repair and the warranty period has expired; or the end of the fiscal year is approaching and the requiring activity has money to "burn.")

This is generally considered the most abused of the seven authorities.

## Industrial Mobilization

Industrial mobilization decisions are made at management levels beyond the contracting officer or requiring activity. This authorization may be used when it is necessary to:

- "(i) Establish or maintain an essential capability for theoretical analyses, exploratory studies, or experiments in any field of science or technology;
- (ii) Establish or maintain an essential capability for engineering or developmental work calling for the practical application of investigative findings and theories of a scientific nature; or
- (iii) Contract for supplies or services as are necessary incident to paragraphs above"

Situations that may apply to this authorization are:

- Strategic Defense Initiative
- Solar energy
- Agency specific procurements

**FOR EXAMPLE:**

The requiring activity limited competition to four sources for night vision image intensifier tubes. The four sources were selected because of their proven ability to manufacture the tubes in large quantities. Using full and open competition would limit the agency's control over the quantity of tubes manufactured by any one firm--and would therefore have less assurance of a sustained manufacturing base.

The goal of this authority is to assure a continuous and secure stream of production for mobilization purposes--not to maximize competition.

## COMPETITION

**International Agreement** The purchase request will indicate when a procurement is subject to an international agreement and will provide pertinent information about the agreement. This authorization may be cited when:

"(1) A contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written direction such as a Letter of Offer and Acceptance; or

(2) When a contemplated acquisition is for services to be performed, or supplies to be used, in the sovereign territory of another country and the terms of a treaty or agreement specify or limit the sources to be solicited."

Situations that may be applicable to this authority include:

- Foreign Military Sales
- Agency specific procurements

### **FOR EXAMPLE:**

Under the terms of an international agreement between the U.S. and Turkey, the foreign government has specified in writing that competition on the acquisition of equipment, parts, and services associated with PEACE III program be restricted to Howard Industries to ensure single vendor integrity.

The written direction alone takes precedence over full and open competition and is therefore sufficient justification for restricting competition under this authority.

☞ **NOTE:** Just stating this authority on the purchase request may not be sufficient for your agency. Generally, these circumstances are well documented by the requiring activity; however, when in doubt investigate! Requests from foreign countries that do not direct you to procure from a particular source should be accomplished through full and open competitive procedures.

---

**Authorized or Required  
by Statute**

If the purchase request identifies the source(s) as required by statute (or law), this authorization may be cited when:

- "1. Statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or
2. Agency's need is for a brand name commercial item for authorized resale."

It is common practice to acquire certain supplies and/or services off "Schedules" from agencies such as

- General Services Administration,
- Defense Logistics Agency,
- Veterans Administration,
- Office of Personnel Management.

In addition, you may be required to acquire specific products or services from "specified sources" such as

- Federal Prison Industries Inc.,
- Qualified Nonprofit Agencies for the Blind or other Severely Handicapped, and
- Government Printing Office.
- Sole source awards under the 8(a) Program.

The DOD and civilian agencies generally buy brand name commercial products that are preferred by customers of the selling activity for resale at their respective commissaries and/or base exchanges.

**FOR EXAMPLE:**

A requirement for data entry must be procured from Federal Prison Industries, Inc.

☞ **NOTE:** Although these sources have been identified by a statute, you may obtain a waiver if the source cannot meet the agency's need (e.g., timely delivery, economically priced, minimum specifications).

National Security

If national security applies to a procurement, the purchase request or subsequent documentation should indicate this designation. This authority can be used when it can be clearly demonstrated that:

"Disclosure of the agency's need would compromise the national security unless the agency is permitted to limit the number of sources."

Some situations that may apply to this authorization are:

- Covert operations
- Research and development
- Weapon systems

**FOR EXAMPLE:**

The requirement is for the "black box system" to enhance missile

## COMPETITION

control. There are only three sources known from which to solicit who possess top secret clearances and who have experience in this line of work.

If full and open competition procedures were used, the Government may compromise security requirements that could have an adverse effect on the nation.

☞ **NOTE:** Do not use this authority merely because access to classified data will be necessary or the acquisition is classified.

---

### Public Interest

If the purchase request or supporting documentation attempts to limit competition and none of the other six authorities apply, this authority may be appropriate when:

"The agency head determines that it is necessary in the public interest to use other than full and open competition in the procurement concerned."

☞ **NOTE:** This authority is very general and requires high level visibility; therefore, it is important not to use it unless evidence from the requiring activity fully supports this determination. If you determine this authority is appropriate, an individual D&F must be approved by the agency head with substantial supporting data supplied by the requiring activity. A Justification and Approval may also be required by the head of the agency. In addition, you must prepare written notification for submission to Congress at least 30 days before award.

Although the requiring activity has recommended that competition be restricted, other than FAOC procedures cannot be used

- until you have attempted to locate additional sources, and
- your market research (to locate these sources) fully supports the recommendation.

---

It is also inappropriate to have a bona fide sole source requirement and select competitive procedures. You are responsible for determining the degree of competition for the procurement.

**8.2 Determine Whether to Exclude Sources**

There are three groups of procurements which are categorized as "Full and Open Competition after the Exclusion of Sources":

FAR SubPart 6.2

1. Alternative sources,
2. Set-asides for small business and labor surplus area concerns, and
3. 8(a) competition.

For (1) and (2), procedures requiring the use of full and open competition must be followed after the exclusion of source(s).

Alternative Sources

The Competition in Contracting Act provides that agencies are permitted to exclude particular sources when it is necessary to establish or maintain alternate source(s) if the agency head determines that to do so would:

1. Increase or maintain competition and likely result in reduced overall costs;
2. Be in the interest of national defense for emergency or industrial mobilization; or
3. Be in the interest of national defense to maintain educational/nonprofit research & development capability.

Small Business and Labor Surplus

To fulfill the statutory requirements relating to small business and/or labor surplus area concerns, contracting officers may set aside solicitations to allow only such business concerns to participate.

8(a) Competition

To fulfill the statutory requirements relating to section 8(a) of the Small Business Act, as amended, contracting officers may limit competition to eligible 8(a) contractors.

## COMPETITION

### 8.3 Determine Whether J&A or D&F is Required



FAR 1.701

When full and open competition is used, no documentation is necessary to support that decision. However, if your market research and other analysis indicate that you will not use FAOC, then you must prepare either a

- Determination and Findings (D&F), or a
- Justification for Other than Full and Open Competition (J&A)

#### **Determination and Findings** means a

"special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation."

☞ NOTE: Only D&Fs pertaining to competition will be discussed in this chapter.

**Justification and Approval** means essentially the same as D&F with the exception of the format. The justification must contain sufficient facts and rationale to justify the use of the specific authority cited.

FAR 6.303-1(c)

Documentation is generally for an individual contract action. However, class D&Fs and J&As may be authorized for a class of contracting actions:

- A class may consist of contracting actions for the same or related supplies or services or other contracting actions that require essentially identical justification.
- When a class J&A or D&F already exists for a class of contracting actions, you do not need to prepare any other document.
- You are required to determine if the procurement is within the scope of the class justification and shall document the file accordingly.

The circumstances in Exhibit 8-2 identify when a D&F or J&A apply.

<b>DETERMINING WHEN TO USE J&amp;A'S AND D&amp;F'S</b>	
<b>If This Circumstance:</b>	<b>Then Use This Documentation</b>
<u>Full and Open Competition</u> (includes Brand Name or Equal descriptions)	None
<u>FAOC after Exclusion of Sources</u>	
• Set-asides	None
• Establishing alternative sources	D&F
<u>Other than Full &amp; Open Competition</u>	
• 6.302-1 (Only One Source, -includes Brand Name Only)	J&A
• 6.302-2 (Urgent & Compelling)	J&A
• 6.302-3 (Industrial Mobilization)	J&A
• 6.302-4 (International Agreement)	J&A***
• 6.302-5 (Authorized or Required by Statute)	
- Brand name authorized for resale	None
- Qualified Nonprofit Agencies for the Blind or Severely Handicapped	None
- 8(a)	None
- Federal Prison Industries, Inc.	J&A*
- Government Printing and Binding	J&A*
- Any other required source (including other agencies)	J&A*
• 6.302-6 (National Security)	J&A
• 6.302-7 (Public Interest)	D&F**
*J&A is required unless agency statutes waive this requirement.	
**J&A must also be prepared if required by agency head.	
***DoD, NASA, and Coast Guard - as required by the FY 1990 Defense Acq. Act	

*Exhibit 8-2*



## COMPETITION

### WHAT IS THE BIG RUSH??

*You have determined that the requirement for X-ray security screening systems is urgent. In the remaining three days, you must modify the justification--approval can be made after award to prevent unnecessary delays. MOVE IT!!!*

*What information is needed in the justification?*

*Who is the approving official?*

#### **8.4 Prepare J&A for Other than FAOC**

You are responsible for ensuring that justifications contain all the required information even if the J&A has been prepared by another office. An important factor to remember is to use the authority that best applies to the situation. Justifications should be:

- In writing,
- Certified as accurate and complete, and
- Approved before award with the exception of the Unusual and Compelling Urgency authority when preparation and approval would unreasonably delay the procurement. Approval must be made after award.

At a minimum, all justifications and D&Fs must include the elements in Exhibit 8-3. Following the exhibit is a sample format.

ELEMENTS OF JUSTIFICATIONS AND D&Fs			
JUSTIFICATIONS {FAR 6.303-2}		D&Fs {FAR 1.704}	
1. Identification of agency		1. Identification of agency	
2. Nature and/or description of action		2. Nature and/or description of action	
3. Description of supplies or services		3. Citation of statute or regulation	
4. Identification of statutory authority		4. Findings	
5. Contractor's unique qualifications		5. Determination	
6. Efforts to obtain competition		6. Expiration of date of D&F, if required	
7. CO's fair and reasonable determination		7. Signature of authorized official	
8. Market survey and results			
9. Other supporting factors			
10. Interested sources			
11. Actions to increase competition			
12. CO's certification of accuracy and completeness			

*Exhibit 8-3*

## FORMAT FOR J & A FOR OTHER THAN FAOC

1. **AGENCY AND CONTRACTING ACTIVITY** - Specify the agency and contracting activity responsible for this action.
2. **DESCRIPTION OF ACTION** - Describe the nature of the contractual action for which approval is requested (i.e., new contract, modification). Include type of contract, share and ceiling arrangements, when applicable.
3. **DESCRIPTION OF SUPPLIES/SERVICES** - Describe the supplies or services to be acquired. Include the estimated total value (including options, if any).
4. **AUTHORITY CITED** - Identify the statutory authority, including title and citation permitting other than full and open competition.
5. **REASON FOR AUTHORITY CITED** - Describe how this action requires the use of the authority cited. If applicable, identify the proposed or potential contractor and include a discussion of the proposed contractor's unique qualifications for fulfilling the contract requirements.
6. **EFFORTS TO OBTAIN COMPETITION** - Describe efforts made to ensure that offers are solicited from as many potential sources as is practicable. Also describe the extent of competition anticipated for this acquisition.
7. **FAIR AND REASONABLE DETERMINATION** - Describe techniques (i.e., cost analysis, price analysis, audit, should cost, Government estimate, etc.) which will be the basis used to determine anticipated costs are fair and reasonable.
8. **MARKET SURVEY** - Describe the market survey conducted to identify all qualified sources. If a survey was not conducted, explain why it was not.
9. **OTHER FACTORS** - Discuss any other factors supporting the use of other than full and open competition such as:
  - a. **Acquisition data availability** - Explain why technical data packages, specifications, engineering descriptions, statements of work or purchase descriptions suitable for full and open competition have not been developed or are not available. Describe actions taken or planned to remedy this situation.
  - b. **Follow-on contracts** - Include an estimate of the cost that would be duplicated and the basis and derivation of the estimate.
  - c. **Unusual and Compelling Urgency** - Provide data, estimated cost or other rationale as to the nature and extent of the harm to the Government.

## COMPETITION

10. **INTERESTED SOURCES** - Include a listing of the sources that expressed written interest in the acquisition. If Only One Responsible Source is the intended authority, explain why such other sources responding to the synopsis were rejected. If the justification is submitted and approved prior to synopsis, notify the approving authority in writing if any responding sources are rejected.

11. **ACTIONS TO INCREASE COMPETITION** - Include a statement of the action taken (or to be taken to increase competition before any subsequent acquisition of the supplies or services is required. There may be instances where it is not possible to compete the current acquisition; explain how competition will be increased or enhanced for the required supplies or services (include breakout or other considerations)).

12. **CONTRACTING OFFICER CERTIFICATION** - Include the following statement: "I certify that the facts and representations under my cognizance which are included in this justification are accurate and complete to the best of my knowledge and belief."

NAME\_\_\_\_\_ DATE\_\_\_\_\_

TITLE\_\_\_\_\_ SIGNATURE\_\_\_\_\_

13. **TECHNICAL CERTIFICATION** - Include the following statement: "I certify that the supporting data under my cognizance which are included in the justification are accurate and complete to the best of my knowledge and belief."

NAME\_\_\_\_\_ DATE\_\_\_\_\_

TITLE\_\_\_\_\_ SIGNATURE\_\_\_\_\_

14. **REQUIREMENTS CERTIFICATION** - Include the statement in paragraph 13 above.

NAME\_\_\_\_\_ DATE\_\_\_\_\_

TITLE\_\_\_\_\_ SIGNATURE\_\_\_\_\_

15. **REVIEW/COORDINATION** - Your agency may require other reviews such as lower level competition advocates, director of contracting, small and disadvantaged utilization specialist, and legal.

16. **APPROVAL**

NAME\_\_\_\_\_ DATE\_\_\_\_\_

TITLE\_\_\_\_\_ SIGNATURE\_\_\_\_\_

Technical experts are the officials responsible for providing and certifying that the data, supporting their recommendations for other than full and open competition, are accurate and complete.

- Critique the recommendation based on acquisition histories, market research, and your general knowledge about the commodity before you accept the justification.
- If there is any doubt, challenge the recommendation.
- When the requiring activity certifies their recommendation and your market research confirms it, chances are you have a legitimate procurement for other than FAOC.
- Your CO can now certify the justification is accurate and complete.

Remember, you make the decision and will be required to defend it. Many procurements the requiring activity had deemed to be sole source are changed to permit full and open competition once certification is requested by the contracting office.

The circumstance for restricting competition will determine the extent of documentation. The justification must show your efforts to remove any barriers to competition and any further procurements of the same supplies or services. For example:

Substantial data must support a decision for only One Responsible Source unlike the documentation needed for International Agreements.

The justification in its entirety will be released to the public upon request; therefore, the data must sufficiently support the decision made.

## Approval Levels

FAR 6.304(a)
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Now that the circumstance has been documented to support other than full and open competition, you must get approval from one of the following officials:

1. **Contracting Officer:** The individual with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. (Note: The contracting officer's certification will serve as approval unless a higher approving level is established in agency procedures.)
2. **Competition Advocate:** Agency heads are required to designate competition advocates for the agency and for each procuring activity of the agency.

## COMPETITION

3. **Head of Procuring Activity:** General, flag officer, or GS-16 or above; or in a comparable or higher position in another schedule. Individual who has overall responsibility for managing the contracting activity.

4. **Senior Procurement Executive:** All agencies except DoD, NASA, Coast Guard: individual appointed pursuant to OFPP Act. This authority may not be delegated. DOD, NASA, and Coast Guard as required by the FY 1990 Defense Authorization Act.

5. **Agency Head:** Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency unless otherwise indicated.

APPROVAL LEVELS (Class and Individual)		
Official	Dollar Value	Circumstance
Contracting Officer	Up to \$100,000	All except 6.302-7
Competition Advocate	\$100,000 - \$1 million	All except 6.302-7
Head of Procuring Activity	\$1 million - \$10 million	All except 6.302-7
Senior Procurement Executive	Over 10 Million	All except 6.302-7
Agency Head	Any amount	6.302-7

*Exhibit 8-4*

The appropriate approving official is determined by the particular circumstance and the dollar value (including the cost of any options) of the procurement as shown in Exhibit 8-4.

### Competition Advocates

FAR 6.502

Agency competition advocates are responsible for:

1. Challenging barriers to and promoting FAOC.
2. Reviewing contracting operations to identify opportunities to achieve FAOC.
3. Preparing annual report to agency procurement executive.
4. Recommending annual goals and plans for increasing competition.
5. Recommending system of accountability for competition.

Competition advocates are also appointed for each procuring activity of an agency.

### 8.5 Determine if Synopsis is Required

Just because you have been authorized to use one of the seven circumstances for other than FAOC, you have not been authorized to waive the synopsis requirements even if a sources sought synopsis was previously published (See Chapter 3). Exhibit 8-5 is a decision table on whether to synopsise other than FAOC actions.

SYNOPSIS REQUIREMENTS	
If This Authority {FAR 6.302}	Then {FAR 5.202(a)}
Only One Responsible Source	Synopsise; except maybe utility and unsolicited research proposal.
Unusual and Compelling Urgency	Exempt
Industrial Mobilization	Exempt
Authorized or Required by Statute	Exempt
Public Interest	Exempt
International Agreement	Exempt
National Security	Synopsise, if appropriate; except if disclosure is compromising.

*Exhibit 8-5*

FAR 15.402(h)

☞ **NOTE:** The results of a synopsis may overturn the justification for other than FAOC. Even though a synopsis may not be required, an informal market survey can be conducted (See Chapter 3.2) within the prescribed deadlines.

COMPETITION

NOTES

## CHAPTER 9

# LEASE VS. PURCHASE

### TEMPORARY OR PERMANENT

*You are planning a procurement to fulfill the requirement for various medical equipment (e.g., examining tables, lamps, and x-ray lamps).*

- 1. Should you solicit for lease only?*
- 2. Purchase?*
- 3. Or both?*
- 4. Maybe lease with option to buy?*



## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

- Overall:**
1. Determine whether to solicit for:
    - Lease
    - Purchase
    - Both
  2. If the decision is to solicit for both, evaluate offers and determine whether purchase or lease represents lowest total discounted cost to the Government.

**Individual:**

- 9.1 Determine whether policies prescribe purchase or lease of requirement.
- 9.2 Review acquisition history and conduct market research.
- 9.3 Determine whether to solicit for purchase alone.
- 9.4 Determine whether to solicit for lease with option to purchase.
- 9.5 Solicit for all methods and select appropriate provisions.

## INTRODUCTION TO LEASE VS. PURCHASE

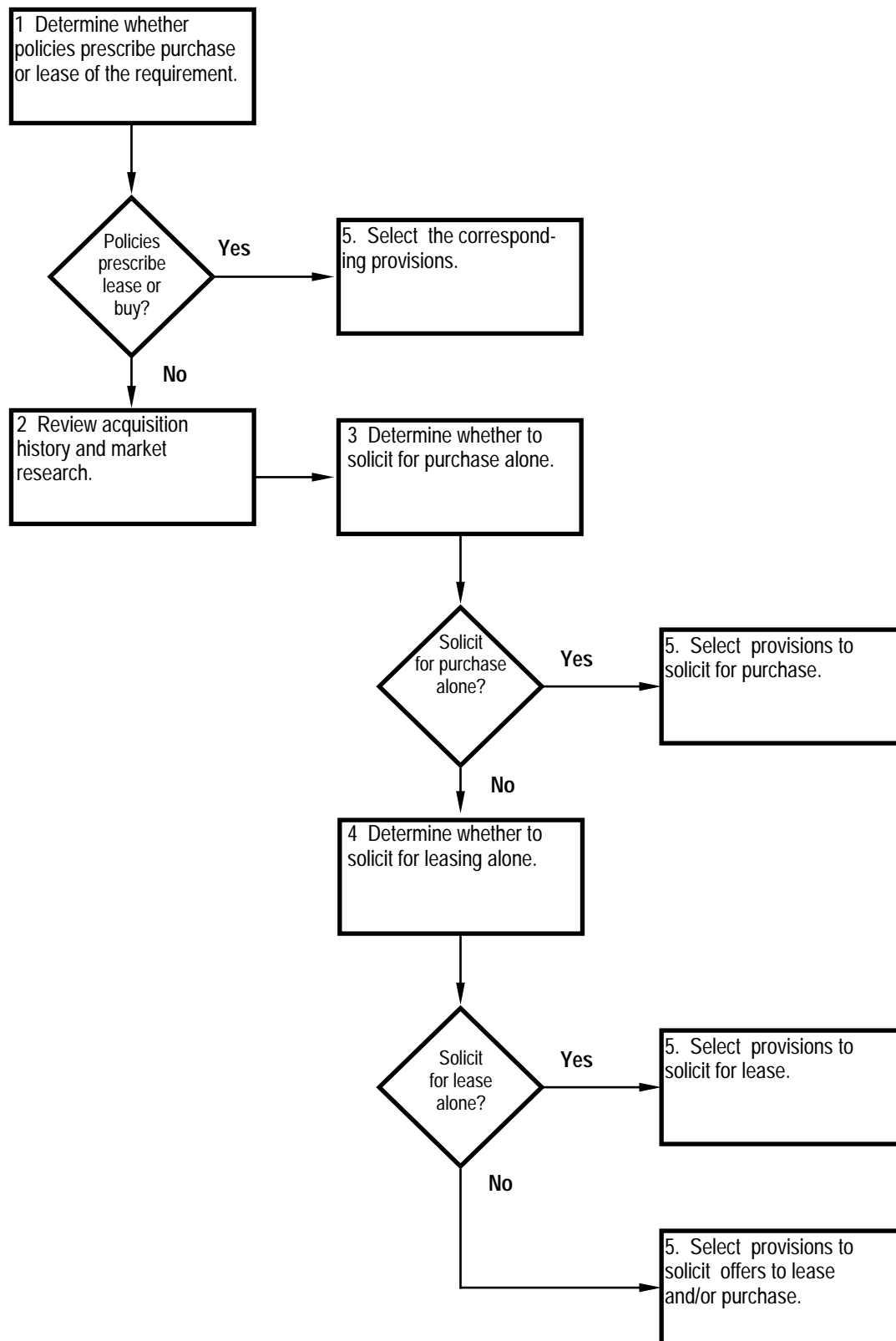
**Acquisition Considerations** The Government solicits offers for equipment by leasing, purchasing, or both. If you decide to solicit both kinds of offers, you must evaluate them and determine whether a purchase or a lease represents the lowest cost to the Government. Leasing with an option to purchase is also possible.

**Criteria** Agencies decide whether to lease or purchase equipment on a case-by-case evaluation of comparative costs and on other factors such as:

- Net purchase cost vs. the cumulative leasing cost
- Potential obsolescence
- Immediate need vs. uncertain long-term need
- Transportation, installation, and maintenance cost
- Funding availability

**Steps in Performance** The steps in determining whether to lease or purchase are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN DECIDING WHETHER TO LEASE OR BUY



# STEPS IN DETERMINING WHETHER TO LEASE OR PURCHASE

## 9.1 Determine if Policy Prescribes Lease or Purchase

Most acquisitions require you to solicit offers for the

- purchase of a product or
- performance of a service.

The difference between purchase and lease is whether or not title is transferred at the time of payment. Since title is not an issue in acquiring services, leasing applies only to products (generally equipment). Application is to both the

**FAR 7.400**

- initial acquisition of equipment and
- renewal or extension of existing equipment leases.

You should consider both leasing and purchase unless your agency has established a different policy. Legislation or policy decisions may be based on specific equipment. Factors to consider in making lease/purchase determination include:

- Estimated length and extent of use.
- Financial/operating advantages of different types and makes.
- Cumulative rental payments.
- Net purchase price
- Transportation and installation costs.
- Maintenance and other costs.
- Potential obsolescence due to technological improvements.
- Availability of purchase options.
- Potential for reuse of equipment by other agencies.
- Trade-in or salvage value.
- Imputed interest.
- Availability of a servicing capability.

**FAR 7.401**

## 9.2 Review Market Research

To help you make your decision, review any acquisition histories and conduct market research to determine:

- Stability of the technology
- Trends in pricing
- Standard commercial policies and practices of
  - Manufacturers
  - Distributors and other secondary suppliers
- Standard commercial maintenance plans

## LEASE VS. PURCHASE

### 9.3 Determine to Solicit for Purchase

The results of your market research will help you decide to solicit for purchase alone. Some indicating factors are:

1. Requirement does not lend itself to leasing.

Perishables, weapons, and spare parts are examples of requirements that are not leased.

2. Requirement will be provided to other contractors as GFP.

Realistically, the problems with ownership and responsibility for warranty, maintenance, and administrative control would far outweigh any benefits realized through leasing the item.

FAR 7.402(a)

3. Product has a long expected life and will not need upgrading.

Leasing costs never end as long as you continue to use the equipment. Any products with a long expected life such as desks and chairs would continue to be used long after they have been paid for. Agencies should not rule out the purchase method in favor of leasing solely because of the possibility that technological advances might make the equipment less desirable.

4. Equipment has limited period of use.

For example, you would not purchase a crane needed on a one day basis. It would be better to pay leasing cost for that day only.

5. Products are to be used in a secure area.

Purchase method should be used, unless security can be assured under a lease. Leasing companies retain ownership of products and must be accessible to them at all times. Problems may arise because some security areas do not allow contractors on site.

### 9.4 Determine to Solicit for Lease

Your research may lead you to determine that purchasing the equipment would not be cost effective. Leasing may be more suitable for:

- ADP (automated data processing)
- Material handling and heavy construction equipment
- Automobiles
- Office machines

FAR 7.402(b)

There are several leasing plans from which to choose:

#### STRAIGHT LEASE

The contractor retains title to the equipment during the period of use.

- Equipment is returned to contractor at the end of the contract.

- Leasing beyond one year is accomplished through options to extend the period of lease.
  - Any optional period must begin and end with the fiscal year.
  - Contractor may be required to upgrade equipment as parts become available.
  - Contractor is generally required to maintain equipment in good working order.
- 

#### LEASE WITH OPTION TO PURCHASE

The Government leases the equipment and at a specified period(s) in the contract, must determine whether to purchase the equipment or return it to the contractor. Generally, the purchase price is reduced by subtracting a predetermined amount already paid as a part of the lease.

**For example:** you may be leasing a copy machine for one year with the option to purchase it at the end of that time. Each month you pay \$500 of which \$350 will be credited to the purchase price of \$10,000. At the end of one year \$4200 would be deducted from the \$10,000 leaving a balance of \$5800.

---

#### LEASE TO OWNERSHIP (also called installment sales)

The Government has committed to purchase the equipment at the end of a predetermined period. This plan is beneficial to the Government when the equipment has a high dollar value.

**For example:** the Government might need a \$10 million sophisticated piece of scientific equipment. The budget would not permit spending the entire amount for outright purchase. It would be beneficial to lease the equipment for five years under the lease to ownership plan. Unlike the lease with option to purchase, the lease payments include all costs associated with the purchase. At the end of five years, title would transfer to the Government.

The Anti-Deficiency Act prohibits obligations beyond fiscal years. Under the lease to ownership plan, the Government retains the right to cancel the contract at the end of each fiscal year. The Government would exercise this right only when funds were not available for the next fiscal year.

## LEASE VS. PURCHASE

If this plan is being considered, you should maintain accurate records to ensure that the Government retains accrued credits and/or equity in the event the funds are no longer available. The credits or equity should be transferred to your agency to be used for purchasing other equipment.

There are many variations for each of these plans. Exhibit 9-1 lists some conditions that indicate a leasing method is appropriate.

### CONDITIONS FOR LEASING

- One time use and no future need.
- Urgency.
- Products needed only on a limited, intermittent basis.
- Leasing is the only means available for obtaining goods from the market.
- Maintenance by Original Equipment Manufacturer offered only on leases.
- Continued need not known beyond period of performance.
- Suitability cannot be determined without a prolonged trial period.
- Prices are expected to rapidly decline or technology is expected to rapidly improve during the period of need.

*Exhibit 9-1*

### 9.5 Solicit Offers to both Lease and Purchase

If you cannot readily determine whether the requirement should be purchased or leased, your only other consideration is to solicit offers for both. Solicit offers to cover one or more of the following:

- Purchase
- Lease only
- Lease with option to purchase
- Lease to ownership
- Variation of any of the above

You must include the lease vs. price factors and method of evaluation in Section M, Evaluation Factors for Award of the solicitation.

#### FAR 7.403

☞ **NOTE:** When requested by an agency, GSA will assist in lease or purchase decisions by providing information such as:

- Pending price adjustments to FSS contracts,
- Recent or imminent technological developments,
- New techniques, and
- Industry or market trends.

## CHAPTER 10

# EVALUATION FACTORS FOR AWARD

### TRUTH OR CONSEQUENCES

*It is clear to you that the apparent low bidder is Dynamics, Inc. However, there are six bidders and two price-related factors that you must evaluate. The factors are transportation and economic price adjustment. The bidders have submitted additional prices for these factors:*

- *FOB destination charges*
- *Price increases for two option years.*

*What governs how these price-related factors are applied?*

*How do you do the actual evaluation calculations?*



## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

**Overall:** Prepare special standards of responsibility, technical/business management “go/no-go” factors, and technical/business management ranking factors.

Critique proposed technical/business management standards or evaluation factors (along with the corresponding technical proposal instructions).

**Individual:**

10.1 Identify the number of awards that might be made.

10.2 Identify applicable price-related factors.

10.3 Review price-related factors as a whole.

10.4 Select and complete method of award provisions.

10.5 Determine if technical evaluation is needed.

## INTRODUCTION TO EVALUATION FACTORS

### **Purpose of Evaluation Factors**

Evaluation factors are designed to:

- maximize competition,
- minimize the complexity of the solicitation and the evaluation,
- ensure impartial and complete evaluation of all proposals, and
- facilitate selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated Government requirements.

### **Why Establish Guidelines?**

Guidelines and procedures are established to:

- fulfill public responsibilities to be impartial and fair,
- avoid protests and delays in performance/delivery, and
- promote competition by establishing and observing “rules of the game.”

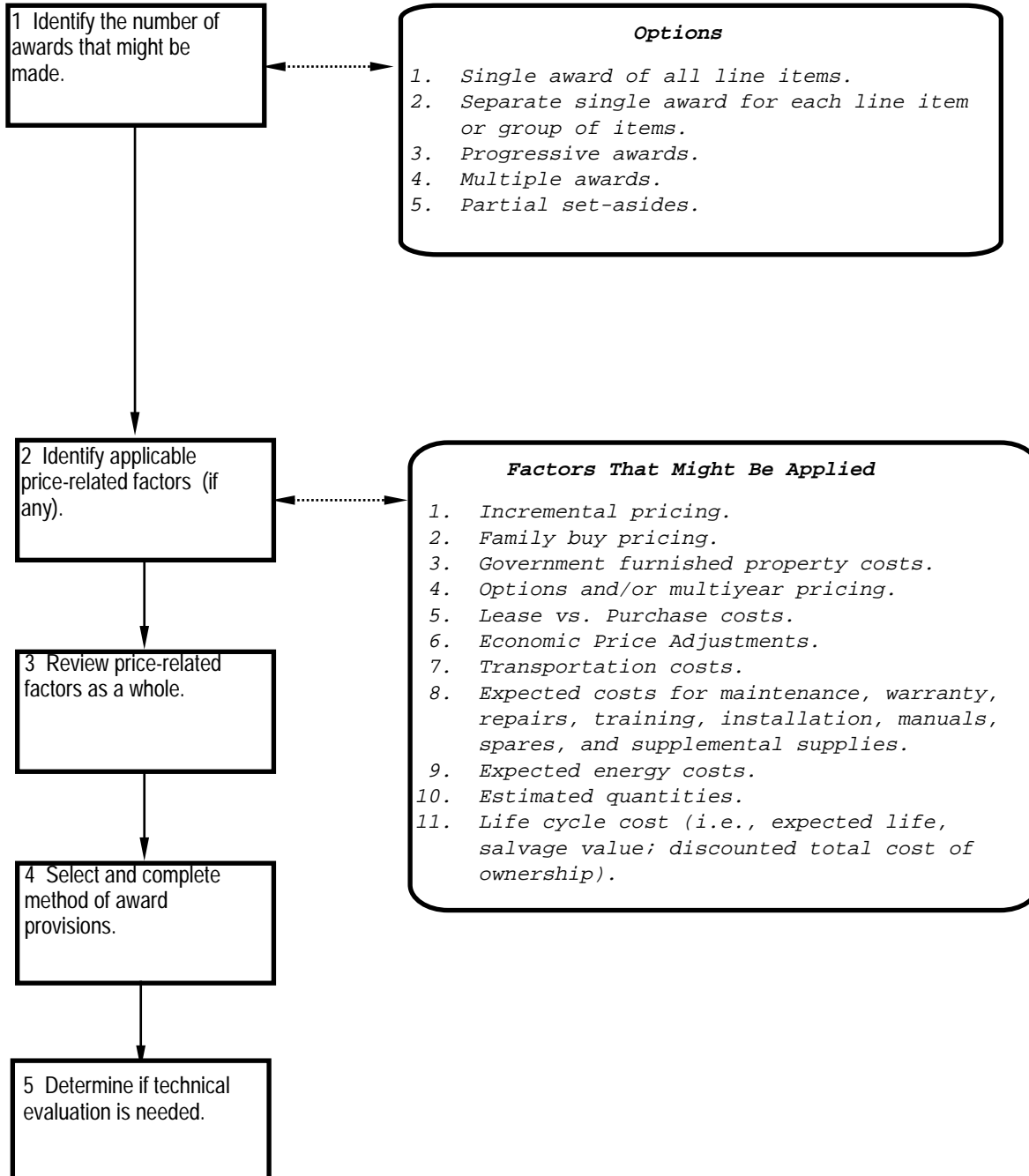
The basis for determining the method of award, can be divided into three general categories:

1. More than one award.
2. Award based on price and price-related factors.
3. Award based on technical evaluation factors.

### **Steps in Performance**

The steps in determining evaluation factors for award are charted on the next page. Following the chart, each step is discussed in turn.

## STEPS IN DETERMINING EVALUATION FACTORS



## STEPS IN SELECTING EVALUATION FACTORS

### 10.1 Identify the Number of Awards

Contracts are frequently awarded to more than one offeror under the same solicitation. In fact, one award is not always cost effective nor best meets the Government's minimum requirements. Exhibit 10-1 describes the types of awards that can be made under a solicitation.

TYPES OF AWARDS		
AWARD TYPE	DESCRIPTION	WHEN BEST TO USE
Single buy	All line items to one contractor.	Cannot fragment requirements between contractors.
Separate single	Different line items to more than one contractor; also known as "multiple awards."	Requirements do not have to be used as parts of a whole.
Progressive	A quantity that exceeds any contractor's capability; permits award to next low offeror until entire quantity is awarded.	No one firm is capable of producing entire amount.
Multiple Award Schedule	More than one firm offering their "most favored" prices; requisitioner selects lowest priced item that meets their needs.	Line item that cannot be clearly defined at solicitation.
Partial set-aside	Variation of progressive; one portion of entire amount requirement is unrestricted and remaining portion is restricted (set-aside for small business concerns).	No one small business is capable of producing.

*Exhibit 10-1*

Whenever you award to more than one offeror, you must assign different contract numbers. Each award is to a different contractor and, therefore, must be administered, monitored, and paid individually.

As a result, you must consider the Government's cost to administer more than one contract when making your award decision (See Section 10.2 for example.)

## EVALUATION FACTORS

**FAR 19.202-1**

To encourage small business participation in your procurement, you may recommend:

- Dividing proposed acquisitions of supplies and services into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.
- Planning acquisitions such that, if practical, more than one small business concern may perform the work, if work exceeds amount for which a surety may be guaranteed by SBA against loss.

### **10.2 Identify Price and Price-related Factors**

At times, contracting officers can determine the lowest priced offer simply by looking at the bottom line. This price should include all costs to the Government.

However, many times a price-related factor, which has an impact on one or more offerors' prices, must be applied to the bottom line to determine the lowest overall offer.

- You must evaluate the offered price taking into consideration those price-related factors stated in Section M, "Evaluation for Award," of the IFB or RFP. (For this reason, the lowest bid price as shown on the abstract of offers at the time of bid opening may not be the lowest bid after application of the factors.)
- Price-related factors are used strictly for comparing offers.
- They are not to be added to the contract award price.

To be fair, then, the Government must tell offerors in the solicitation:

- which price-related factors, if any, will be applied and
- how they will be calculated to determine the "best buy" price.

Examples of commonly applied price-related factors are shown in Exhibit 10-2. Each is discussed in more detail following the Exhibit.

<b>COMMONLY APPLIED PRICE-RELATED FACTORS</b>	
<b>FAR 14.201-8</b>	
<b>Factor</b>	<b>Definition</b>
1. Foreseeable costs or delays	<p>Costs resulting from extra permissible costs or differences in inspection, locations of supplies, and transportation.</p> <p>Also, including:</p> <ul style="list-style-type: none"> <li>- cost of furnishing Government property to contractor.</li> <li>- prices for various options.</li> <li>- submission of separate prices for leasing the item vs. buying it.</li> <li>- proposed or expected costs for maintenance, warranty, repairs, training, installation, manuals, spares, and supplemental supplies.</li> <li>- expected energy costs.</li> <li>- life cycle costs (expected life, salvage value, discounted total cost of ownership).</li> </ul>
2. Changes	Made or requested by the bidder in any of the provisions of a solicitation. Assumed economic price adjustments (if offerors propose different terms than established in the solicitation).
3. Economic advantage of one or multiple awards.	If you determine that you might issue multiple awards, include the multiple awards provision as a price-related factor in Section M of the solicitation.
4. Federal, state and local taxes	Certain fuels require excise taxes under certain conditions.
5. Origin of supplies	<p>Foreign made vs. U.S. Buy American Act requires that, with certain exceptions, only domestic end products shall be acquired for public use. End products are materials, articles, and supplies acquired for public use under a contract.</p> <p>Trade Agreements Act provides for the purchase of products produced in designated countries.</p>

*Exhibit 10-2*

## EVALUATION FACTORS

Foreseeable Costs or  
Delays to the  
Government

**FAR 47.304-1**

If you plan to buy supplies and delivery will be F.O.B. origin, you may state in Section M of the solicitation that cost of transportation (shipping costs) to destination is a price-related evaluation factor. [Generally, you select the F.O.B. point that will cost the Government the least (based on acquisition history) or request offers both with and without transportation cost.]

When evaluating the offers received, consider the cost of transportation from the point of origin (each offeror's point of shipment) to destination to determine which overall price is most favorable to the Government.

**For example:**

<u>Bidder</u>	<u>Bid Price</u>	<u>Transportation</u>	<u>Total</u>
A	\$65,000	\$650	\$65,650
B	\$63,900	\$1,800	\$65,700

In the example, Firm B was the apparent low bidder at time of bid opening but after applying the price-related factor, the most advantageous price to the Government will result from award to Bidder A.

Changes Made or  
Requested by Offeror

This price-related factor results from changes made in any of the provisions of the solicitation, provided the changes do not constitute grounds for rejection of offers.

**Example #1:**

The specification is for a 10,000 btu heater to operate on 110 volts, and the solicitation authorized specification changes provided essential requirements of the heater are met. The low bidder offers a 10,000 btu unit that operates on 220 volts. As part of its bid, the bidder requests that the specification be changed to show operation on 220 volts. The next low bid is for a 110-volt unit. The low bid could be considered if the operating costs of the 220-volt unit are less than or no more than the costs for the 110-volt unit, including any cost to provide a 220-volt outlet (if required).

**Example #2:**

Another change that may be permissible is economic price adjustment (EPA). The EPA clause may be used in an IFB or RFP when:

- There is serious doubt concerning the stability of market conditions during the period of the contract, and

- Contingencies that would otherwise be included in the contract price can be identified and covered as a separate item in the contract.

Price adjustment should be restricted to industry-wide contingencies that are beyond the contractor's control.

**FAR 14.407-4**

When a solicitation does not contain an economic price adjustment clause but an offeror proposes one with a ceiling price, the offer will be evaluated on the basis of the maximum possible economic price adjustment for the period of the quoted base price.

If the offeror does not propose a ceiling, the offer must be rejected.

Exhibit 10-3 illustrates the evaluation of offers based on a solicitation containing the EPA clause.

<b>EVALUATING OFFERS THAT INCLUDE THE ECONOMIC PRICE ADJUSTMENT CLAUSE</b>	
<b>CONDITION</b>	<b>PRESCRIBED ACTION</b>
No offerors elect to use the clause without the EPA added:	Evaluate offers on the basis of quoted prices.
Offeror increases the maximum percentage of escalation outlined in the solicitation:	Reject offer as nonresponsive.
Offeror deletes the EPA clause:	Reject offer as nonresponsive.
Offeror decreases the maximum percentage of escalation stipulated in the solicitation:	Evaluate offer at the base price on an equal basis with other offers that did NOT reduce the ceiling.
Offeror will only accept the maximum percentage of escalation upwards, but not downwards:	Reject offer as nonresponsive.

*Exhibit 10-3*



## EVALUATION FACTORS

### Economic Advantages of Multiple Awards

FAR 52.214-22  
or  
FAR 52.215-34

If you think you might issue more than one award under a solicitation, you shall:

- Include the clause, EVALUATION OF BIDS (or OFFERS) FOR MULTIPLE AWARDS, in Section M of the IFB or RFP.
- Assume, for the purpose of making multiple awards, that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under an IFB or a RFP.

This cost is added for evaluation purposes only. The evaluation procedure is demonstrated in Exhibit 10-4.

MULTIPLE AWARDS				
Bidder	Bid Item 0001	Bid Item 0002	Bid Item 0003	Total Bid
A	\$100,000	\$84,000	\$220,250	= \$404,250
B	120,000	85,000	220,000	= 425,000
C	105,000	83,750	224,500	= 413,250

The lowest total price is Bidder A: \$404,250. To determine whether to make multiple awards, add the lowest bid price for each item and add the administrative cost of \$500 for each award. The administrative cost should be considered only when making more than one award.

Item 0001	\$100,000 (Bidder A)
Item 0002	83,750 (Bidder C)
Item 0003	<u>220,000</u> (Bidder B)
	\$403,750
\$403,750	\$404,250
+ <u>1,500</u> (adm. cost 3 awards)	+ <u>500</u> (adm. cost 1 award)
\$405,250 total <u>evaluated</u> price	\$404,750 total

It appears that it would be more economical for the Government to make three separate awards for \$403,750 versus \$404,250 bid price. However, when administrative costs are considered, you can see that it would be most cost effective to award to Bidder A at \$404,250 (\$404,750 versus \$405,250 for three awards at the evaluation price).

Exhibit 10-4

Federal, State, and  
Local Taxes

**FAR 29.201**

Tax law is very complex, and it is possible in certain cases to get exemptions from taxes. Excise taxes on certain fuels may be exempted under certain conditions. You should consider soliciting prices:

- On a **tax exclusive** basis when it is known that the Government is exempt from these taxes and the exemption is at least \$250.
- On a **tax inclusive** basis when no exemption exists or the exemption is less than \$250.

Federal excise taxes may be imposed on certain motor vehicle articles, tires and inner tubes, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers or importers.

**FAR 52.229-1 thru 10**

There are various clauses related to federal, state, and local taxes and duties that you must consider when developing price-related factors for taxes.

If taxes are likely to be a significant problem, request assistance from the agency-designated counsel in resolving tax matters.

Buy American Act

**FAR 25.102**

The Buy American Act of 1933 requires that with certain exceptions, only domestic end products shall be acquired for public use. The criteria for the Buy American Act is stated in Exhibit 10-5.

Even though the Act established a strong preference for the acquisition of domestic end products, it also specifies exceptions to the preference.

BUY AMERICAN CRITERIA
Provides for the use of domestic end products.
The product must be:
- An unmanufactured end product, mined or produced in the U.S.
- An end product manufactured in the U.S., if the cost of its components mined, produced, or manufactured in the U.S. exceeds 50 percent of the cost of all its components.

*Exhibit 10-5*

## EVALUATION FACTORS

When you are evaluating offers on both foreign and domestic end products, the regulations provide the following guidelines on how to evaluate the offers:

- The price of a domestic end product from a large business that is not in a labor surplus area is considered unreasonable if it exceeds the foreign price by 6 per cent.
- The price of a domestic end product that is manufactured by a small business or any labor surplus area concern is considered unreasonable if it exceeds the foreign price by 12 percent.

The above comparisons shall be made on an item-by-item basis or made to any group of items on which award may be made, as specifically provided in the solicitation. Note that the foreign bid prices shall include applicable import duties.

During evaluation, you will add either the appropriate 6 or 12 percent price factor to the foreign price. In contracts in excess of \$250,000, the agency head must determine whether the cost is unreasonable if the award would be made to a domestic concern after application of the 12 percent factor.

Examples of adjustments for Buy American offers are illustrated in Exhibit 10-6.

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### Trade Agreements Act

**FAR 25.403**

Products purchased for the Government that are produced in countries designated under the Trade Agreements Act of 1979 are exempt from the percentile adjustments applicable to the evaluation of offers under the Buy American Act when:

- value of the proposed acquisition of an eligible product is at or over the dollar threshold, published in the Federal Register, that is set by the U.S. Trade Representative;

provided, purchases are not:

- Made under small or small disadvantaged business programs
- Indispensable to national security
- Construction, services, R & D
- For Corps of Engineers, FPI, Blind & NISH
- For resale

Most but not all agencies or activities within agencies are covered by the Act and have their own procedures.

BUY AMERICAN COMPARISONS	
<b>Example #1</b>	
Large business domestic bid (not a labor surplus area firm)	\$28,000
Foreign bid	\$26,000 (including duty)
Plus 6% adjustment	<u>1,560</u>
	\$27,560
<b>Award to foreign bidder</b>	
<b>Example #2</b>	
Large business domestic bid (labor surplus area firm)	\$28,000
Foreign bid	\$26,000 (including duty)
Plus 12% adjustment	<u>3,120</u>
	\$29,120
<b>Award to domestic bidder</b>	
<b>Example #3</b>	
Small business domestic bid	\$28,000
Foreign bid	\$26,000 (including duty)
Plus 12% adjustment	<u>3,120</u>
	\$29,120
<b>Award to domestic bidder</b>	

*Exhibit 10-6*

## EVALUATION FACTORS

### 10.3 Review Price-related Factors as a Whole

The evaluation of price-related factors can be simple or complex depending on the

- circumstances of the procurement and
- number of factors included in the solicitation.

The evaluation criteria in Section M of the solicitation should result in the lowest overall cost to the Government based on the

- actual work to be performed by the contractor, as well as
- other costs the Government will incur as a direct result of the procurement (such as life cycle costs).

You will need to formulate a method of applying the factors systematically. If the criteria do not accurately reflect the agency's needs and do not assure that award will be made for that offer which is the lowest overall cost to the Government, the acquisition is likely to result in problems, as described in Exhibit 10-7:

POSSIBLE PROBLEMS IN EVALUATION		
Problem	Description	Result
1. Unbalanced offers [FAR 52.214-10(e) or FAR 52.215-16(g)]	Offers are high on some items and low on others.	May enable offeror to become lowest evaluated offeror through speculation on the accuracy of the Government's quantity estimates in the solicitation; offeror may conceal his pricing strategy from competitors; offeror may be permitted to recover larger sums for earlier performed work.
2. Front-end loading	Enables offeror to recover money in advance of the performance of work.	May be forced to cancel Solicitation.
3. Inaccurate quantity estimates	Offers are extremely low for large quantity and extremely high for smaller quantity.	Government pays exorbitant prices.

*Exhibit 10-7*

#### 10.4 Select and Complete Method of Award Provision

Now that you have selected the price-related factors, you must tell offerors in the solicitation which factors will apply in calculating the "best buy" price. Examples of evaluation factors in Section M, not previously discussed are listed in Exhibit 10-8.

PRICE-RELATED EVALUATION FACTORS	
Evaluation of Options	52.217-4 and 5
Economic Price Adjustment--Standard Supplies	52.216-2
Economic Price Adjustment--Semistandard Supplies	52.216-3
Economic Price Adjustment--Labor and Material	52.216-4
F.O.B. Origin and/or F.O.B. Destination	52.247-45

*Exhibit 10-8*

#### 10.5 Determine if Technical Evaluation is Needed.

When you select an offer for award based on more than just price, these non-price related factors are known as technical evaluation factors. The factors are:

- drafted by the requiring activity,
- reviewed by you for clarity and completeness, and
- included in the solicitation.

Technical evaluation factors are used when the quality of technical performance is important relative to price. Exhibit 10-9 lists potential technical evaluation factors.

POTENTIAL TECHNICAL EVALUATION FACTORS
<ul style="list-style-type: none"> <li>• Understanding the problem.</li> <li>• Technical approach or methodology.</li> <li>• Qualifications of key personnel.</li> <li>• Experience in performing the same or similar work.</li> <li>• Management capability.</li> </ul>

*Exhibit 10-9*

## EVALUATION FACTORS

**Go/No-Go** Sometimes the only issue is whether the contractor's technical proposal is or is not acceptable. In these cases the technical evaluation factors are used only on a "go/no go" basis.

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**Greatest Value** In other cases, proposals are scored or rated against the factors by technical personnel to help determine which offerors have the best potential for successfully completing the work. Higher rated proposals are given more favorable consideration than lower rated proposals. At times, based on technical rankings, you will award to an offeror with a higher price than an offeror that ranked lower on technical factors.

**For example:**

If the statement of work requires the development of an item that will later be produced in quantity, a technical evaluation factor might be "Design for Producibility." The extent to which the producibility factor is addressed in the proposal is evaluated and rated.

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**Business Management Factors** Some technical factors address the capability of the offeror to perform the work, as opposed to the technical merits of the proposal.

- When used in ranking proposals, such factors are often referred to as "business management" factors.
- When applied on a go/no-go basis, these factors serve as "special standards of responsibility"

To achieve the goal of identifying the "best" offeror, evaluation factors must be reliable and valid:

- **To be reliable**, a factor should cause comparable evaluators to evaluate the same proposal consistently.
- **To be valid**, a firm ranking high on the factor should in fact have a higher probability of successfully performing the work than a firm that ranks low on the factor.

## CHAPTER 11

# METHOD OF PROCUREMENT

### THE QUALITY OF THE RING

*The Government has been buying car telephones from Quality Communications Inc., for the past three years. There is a current need to purchase an additional 1500 units. Quality Communications' telephones have excellent distance capabilities; they are far superior to others on the market; and the maintenance required on them is minimal. However, it has been noted, based on a recent market survey that a number of other companies have improved the manufacturing of their phones and Quality Communications is no longer the contractor selling state-of-the-art car phones. This product is not listed on the GSA schedule.*

*The procurement history of this product is as follows:*

<u>Year of Buy</u>	<u>Quantity</u>	<u>Unit Price</u>
<i>1st Buy - 1987</i>	<i>1,300 units</i>	<i>\$180.00</i>
<i>2nd Buy -1988</i>	<i>1,488 units</i>	<i>\$162.60</i>
<i>3rd Buy - 1989</i>	<i>1,825 units</i>	<i>\$126.90</i>
<i>This Buy - 1991</i>	<i>1,500 units</i>	<i>\$105.00</i>
<i>(Gov't estimate)</i>		

*The CO has considered this information and determined that using a sealed bid approach to buying the telephones will benefit the Government.*

*What are the factors in this case that caused the CO to consider a sealed bidding approach? Would you have enough time to use this method of procurement? Would discussions be necessary?*



## COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

**Overall:** Determine the method of procurement:

- Small purchase procedures
- Sealed bidding
- Two-step sealed bidding
- Negotiation

**Individual:**

- 11.1 Review acquisition histories and conduct market research.
- 11.2 Determine if simplified purchasing methods are feasible.
- 11.3 Identify conditions applicable to the requirement.
- 11.4 Select method of procurement.

# INTRODUCTION TO SELECTING THE METHOD OF PROCUREMENT

## What is Method of Procurement?

Method of procurement can be defined as the set of procedures by which the Government translates requirements into contracts. The principal methods of procurement are:

### FAR Part 13

- Small Purchases which apply to contracts under \$25,000 and are simplified because many of the requirements applicable to sealed bidding and to negotiation procedures do not apply.

### FAR Part 14

- Sealed Bidding which employs competitive bids, public opening of bids, and award to the low responsive and responsible bidder. It is generally used for the acquisition of supplies or services that can be precisely described and competed only on the basis of price and price-related factors.

### FAR SubPart 14.5

- Two-step Sealed Bidding which is a combination of competitive negotiation and sealed bidding. The procedure is designed to obtain the benefits of sealed bidding when adequate specifications are not available and discussions with offerors might be necessary.

### FAR Part 15

- Negotiation which means contracting without sealed bidding through the use of either competitive or other-than-competitive proposals and discussions.

## Goal in Selecting the Method of Procurement

The goal in selecting the method of procurement is to attain full and open competition which will result in reasonable prices for the Government. In addition, the method should be one that is fair to prospective contractors.

## Steps in Performance

The steps in determining the method of procurement are charted on the next page. Following the chart, each step is discussed in turn.

## METHOD OF PROCUREMENT

## STEPS IN SELECTING METHOD OF PROCUREMENT

### 11.1 Review Acquisition Histories and Conduct Market Research

One of the reasons for conducting market research and reviewing acquisition histories is to identify issues pertinent to the selection of the method of procurement. Examples of questions you should ask include:

- How much is the dollar value?
- Is there an existing contract?
- Is there more than one firm capable of providing the requirement?
- What is the delivery time frame firms can meet?
- Did the previous procurement require discussions?
- Do the firms compete their products or services based on only price and price-related factors?
- Did the previous procurement require evaluation of a firm's technical capabilities before making award?
- Do the firms provide products or services that are commercially available and can be described adequately and understood by the general public?

The answers to these questions will help you determine which method of procurement to select:

1. Small or simplified purchasing.
2. Sealed bidding.
3. Two-step sealed bidding.
4. Negotiation.

### 11.2 Determine if Simplified Purchasing Methods are Feasible

FAR 13.102

Small purchase and other simplified procedures:

- Reduce the Government's administrative costs significantly as compared to the more formal sealed bidding and negotiated procedures. The price of the product or service would not vary significantly if you use a more formal method.
- Improve opportunities for small business concerns and disadvantaged business concerns.

For small purchase and other simplified procedures, the two key pieces of information from your market research and review of acquisition histories are the

- dollar value of the requirement and
- existence of a required source.

## METHOD OF PROCUREMENT

The dollar value can be determined by:

- Amount shown in the purchase request (Government estimate).
- Prior costs indicated in historical data.
- Current costs and pricing trends from your market research.

When your research reveals an estimated dollar value of \$25,000 or less, you are required to use small purchase and other simplified procedures.

- Supplies acquired by small purchase procedures are often standard, off-the-shelf items readily available from local dealer or vendor inventory.
- The items can be delivered in a matter of days or purchased over-the-counter.

Similarly, services acquired in this manner are generally of short duration and may be obtained from the local market.

**FAR 13.103(a)**

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Your research should also have revealed if a **required source** has been established for your requirement (see Chapter 6). It is not cost effective to duplicate the efforts made in establishing these required sources. Therefore, do not use formal procedures when a required source is available to satisfy the need. The required source can exceed the \$25,000 small purchase limitation.

### **11.3 Identify Conditions Applicable to the Requirement**

Any requirement that cannot be fulfilled through the small purchase or simplified purchasing method must be procured through sealed bidding, two-step sealed bidding, or negotiation.

Existing conditions surrounding the requirement will have a tremendous impact on the method of procurement selected.

The four conditions permitting the use of sealed bidding should be considered first and the file documented with a brief written statement as to which one(s) could not be met when sealed bidding is not used:

1. Competition is anticipated
2. Time permits solicitation, submission and evaluation
3. No need to hold discussions with offerors on their bid/proposal
4. Award will be made on price and price-related factors only

Each condition is discussed in this section.

**Competition**

Competition is more than counting the number of firms in the market place. Firms must be evaluated on issues such as:

- How many are capable of producing the exact product or performing the service when you need it and under your terms?
- How many are in the industry but produce similar items or services?
- How many are most likely to be solicited and in turn would submit an offer?
- Can they establish a price that is independent of other firms that would also be bidding?
- Do the firms sell their products/services to the general public?

The broad concept of competition in Government acquisition refers to situations in which more than one firm seeks to be awarded the same contract.

**Benefits of Competitive Pricing**

Competition is intended to ensure the Government pays, and the contractor receives, prices that represent reasonable payment for the work. Reasonableness of price can be assumed when:

1. all qualified firms have been solicited
2. at least two firms capable of satisfactorily performing independently submit responsive offers
3. the offers are based on awards being made solely on the lowest evaluated price.

The benefits of competition go beyond short-term price advantage. The competitive process can also provide a means for finding out what is available to meet a particular Government need and picking the best solution.

The most important benefits of competition can often be the improved ideas, designs, technology, or quality of supplies and services that potential contractors are motivated to seek, produce, or develop to obtain Government contracts. The chance of being awarded a Government contract or the threat of losing it provides a key incentive for greater efficiency and effectiveness. When competition is restricted, the Government loses opportunities not only to obtain lower prices but also to increase its overall productivity and effectiveness.

## METHOD OF PROCUREMENT

Competition establishes whether competitive or noncompetitive contracting procedures are used. Noncompetitive procedures use only the **negotiation** method of procurement.

### Competitive Procedures

Competitive procedures include:

**FAR 6.102**

- Sealed Bidding
- Competitive proposals using negotiation
- Combined competitive proposals (two-step sealed bidding)
- Other competitive proposals (A&E, certain R&D, and MAS)

Competition, by itself, does not determine which competitive procedure would be the best for the procurement. Any competitive procedure is acceptable for use with:

**FAR 6.401**

- full and open competition,
- full and open competition after exclusion of sources and
- other than full and open competition when the situation does not require noncompetitive negotiations or as otherwise appropriate.

The competitive procedures selected for a procurement will be based on what benefits you are seeking: price or improved ideas, designs, or requirements.

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### Adequate Time

Next, evaluate the amount of time available for obtaining the product or service when it is needed. There are two considerations for determining if adequate time exists for selecting sealed bidding procedures:

1. Amount of time for bidders to **prepare** their bids
2. Amount of time for bidders to **submit** their bids.

### Publicizing Needs

Preparing bids includes the time necessary for bidders to learn of the requirement. This is accomplished by publicizing the requirement as follows:

- Distribute written solicitations that provide the identical information to prospective bidders
  - What is the normal mailing time needed for distribution?
  - What is the geographical distribution of the bidders?

- Post the written solicitations in public places and allow 10 days for bidders to respond to a posted solicitation.
  - How long will it take to add bidders to the distribution mailing list?
  - Should a presolicitation notice precede the solicitation?
- Use other methods as appropriate for the time available:
  - Synopsis in the Commerce Business Daily
  - brief announcements in mass media (trade journals, magazines, etc.)
  - preparing and displaying periodic handouts
  - assisting local trade associations

Each one of these other methods would require extra time. For instance, publicizing in the CBD requires a minimum of 51 days before you even receive the bids. Assisting local trade associations would mean establishing contacts and attending meetings. The amount of time available could limit your choices.

#### Pricing Needs

Your response, even after publicizing, is only as good as the price received. Interested bidders must have adequate time to resolve contingencies (what a subcontractor would charge, how much the transportation would cost, etc.).

You must be able to rely upon the reasonableness of the price without discussions with the offeror. Determination of reasonableness of price for sealed bidding is based on using only price analysis techniques.

#### FAR 15.805-2

Price analysis techniques do not require any discussion with the offeror and include:

- Comparison of proposed prices received in response to the solicitation
- Comparison of prior proposed prices and contract prices with current proposed prices for the same or similar end items
- Application of rough yardsticks (dollars per pound)
- Comparison with competitive published price lists or other published pricing arrangements
- Comparison of proposed prices with independent Government cost estimates

Reducing the leadtime bidders normally have to produce, deliver or perform will make any comparisons less reliable. Determining a reasonable price may require negotiation with the offeror in these cases.



## METHOD OF PROCUREMENT

### Preparation Considerations

When determining a reasonable period of time to allow prospective bidders to prepare their bid, you should also consider:

- complexity of the requirement
- anticipated extent of subcontracting
- whether the requirement has been previously or routinely procured
- whether the requirement is a type of supply or service covered by a master solicitation previously submitted to prospective bidders
- whether there is a limited number of sources (e.g. automotive manufacturers) that can be quickly reached
- whether the estimated price of the requirement can be easily established by the Government and the bidders before soliciting.

### Submission of Bids

Submitting bids includes the time necessary for bidders to package and mail their bid. You must consider the late bid policy of the Government when considering this issue. A bid received after the date and time set may be considered when:

- Bid was sent by certified, registered mail at least 5 days prior to the date set for receipt of bids.
- Bid was sent by U. S. Postal Service Express Mail at least 2 days prior to date set for receipt of bids.

If you unduly limit the time bidders have to prepare and submit bids, one of two reactions could happen:

1. Some prospective bidders would choose not to bid either because they did not know about the procurement or they did not have time to complete or submit the bid.
2. Firms choosing to bid could be forced to include contingencies in their bid driving the price upward.

You should consider using the negotiated method of procurement when firms would react unfavorably to any time constraints.

## Discussions

Determining whether discussions should be held with the offerors is critical to your selection of the best method of procurement to use.

### FAR 15.601

Any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification: eliminating minor irregularities, informalities, or apparent clerical mistakes) whether or not initiated by the Government that

- a. involves information essential for determining the acceptability of a proposal, or
- b. provides the offeror an opportunity to revise or modify its proposal

You do not need to allow for discussions when

- You have confidence in the adequacy of the specification/SOW to describe exactly what you want
- delivery and the other terms are comparable to what is routinely offered in the marketplace and
- the deciding factor as to who will receive the award is based on a comparison of prices received from independent sources

If you can rely upon other sources (catalogs, published price lists, established specifications) to evaluate the acceptability of a firm's offer, the less likely you will need to conduct discussions.

### FAR 15.610

You also do not need to hold discussions when:

1. prices are fixed by law or regulation
2. evaluating the set-aside portion of a partial set-aside or
3. acceptance of the most favorable offer would result in the lowest overall cost to the Government at a fair and reasonable price when full and open competition procedures were followed.

The content and extent of the discussion is a matter of the contracting officer's judgment and is based on the requirement at hand.

## METHOD OF PROCUREMENT

Purpose of Discussions	<p>Discussions can be used to:</p> <ul style="list-style-type: none"><li>• Advise the offeror of deficiencies in its proposal</li><li>• Attempt to resolve any uncertainties concerning the technical requirement</li><li>• Attempt to resolve any uncertainties with other Government terms</li><li>• Come to agreement on a fair and reasonable price</li><li>• Obtain a better understanding of the basis for an offeror's price</li></ul> <p>When sealed bidding procedures are used, you must be able to determine, without discussions, the offeror's ability to provide what you want, when you want it and if their price is fair and reasonable.</p> <p>When competitive negotiation procedures are used, discussions are an either/or proposition and are generally dependent upon the actual offers received or the reason for choosing negotiation over sealed bidding.</p>
Coverage	<p>Just establishing discussions will be needed is not enough. You must also identify what the discussions will cover:</p> <ul style="list-style-type: none"><li>• The technical requirement (specification, statement of work)<ul style="list-style-type: none"><li>-Is the requirement defined in clear, concise and complete terms?</li><li>-Are the requirements commercially available</li></ul></li><li>• The capability of a firm's ability to perform (business factors, experience, organizational structure)</li><li>• Other terms and conditions (delivery, packaging, shipping methods, inspection and acceptance, type of contract)</li><li>• Price (or cost/cost elements)</li><li>• Combination of any or all of the above.</li></ul> <p>The decision to use combined competitive procedures (2-step), or negotiation is based on identifying the limitations of the discussions.</p>

The three methods of award clauses provided for in the FAR cover discussions.

## Sealed Bidding

**FAR 52.214-10**

### Contract Award Sealed Bidding clause

"(a) The Government will evaluate bids in response to this solicitation **without discussions** and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government considering only price and price-related factors specified elsewhere in the solicitation."

## Two-step Sealed Bidding

**FAR 14.503-1(a) (7&8)**

Although there is no specific clause for step one of the two-step sealed bidding procedure, the requests for technical proposals must include:

- A statement that (i) offerors should submit proposals that are acceptable without additional explanation or information, (ii) the Government may make a final determination regarding a proposal's acceptability, either initially or **as a result of discussions**, will be considered for awards and (iii) each bid in the second step must be based on the bidder's own technical proposals.
- A statement that (i) offerors should submit proposals that are acceptable without additional explanation or information, (ii) the Government may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted, and (iii) the Government may proceed with the second step without requesting further information from any offeror; however, the Government may request additional information from offerors of proposals that it considers reasonably susceptible of being made acceptable and **may discuss proposals** with their offerors.

**FAR 14.501**

Step one consists of the request for, submission, evaluation and (if necessary) **discussion** of a technical proposal. No pricing is involved. It is the proper step for clarification of questions relating to the technical requirements.

### Step two of Two-step Sealed Bidding clause

**FAR 52.214-25**

"(a) This invitation for bids is issued to initiate step two of two-step sealed bidding under Subpart 14.5 of the Federal Acquisition Regulation.

## METHOD OF PROCUREMENT

(b) The only bids that the Contracting Officer may consider for award of a contract are those received from bidders that have submitted acceptable technical proposals in step one of this acquisition.

FAR 14.501 (b)

Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made using sealed bidding procedures.

### Negotiated Procedures

#### Contract Award clause

FAR 52.215-16

"(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be the most advantageous to the Government, **cost or price and other factors**, specified elsewhere in this solicitation,

(b) The Government may (1) reject any or all offers if such action is in the public interest, (2) accept other than the lowest offer, and (3) waive informalities and minor irregularities in offers received.

(c) The Government **may award** a contract on the basis of initial offers received, **without discussions**. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

The contract award clause used for negotiation gives the Government the right to hold discussions and warns offerors that the Government may not exercise that right.

---

### Award Factors

The final condition you must consider is whether the award be made using price and price-related factors only to select the firm for the contract.

Both sealed bidding and negotiated procurements use price and price-related factors as the selection factors. However, when you require the selection be based on any factors other than price alone, only negotiated procedures can be used. While two-step sealed bidding allows for discussion on the technical proposal, the selection is made based on price and price-related factors.

Factors other than price include:

technical excellence,  
management capability  
personnel qualifications  
prior experience  
past performance  
schedule compliance  
cost realism.

## Sealed Bidding and Pricing Factors

Price and price-related factors can only be considered in sealed bidding because:

1. No discussions with the offeror are allowed.

- You do not need to hold discussions on the specification and other technical requirements. Specifications must be clear, complete and accurate.
- You do not need to hold discussions on other terms and conditions.
- You are able to determine the price is fair and reasonable using price analysis techniques only.

All of these conditions must exist if sealed bidding procedures were used for the procurement.

2. Sealed bidding contracts must be firm-fixed price contracts (or FP with EPA only). Any other type of contract allows for the negotiation of the contract type with the offeror.

## Types of Contracts

The contract types are grouped into two broad categories:

- fixed-price contracts and
- cost reimbursement contracts

The specific contract types range from firm-fixed price (used with sealed bidding and negotiation), in which the contractor has full responsibility for the performance costs and resulting profit (or loss) to cost-plus-fixed-fee (used with negotiation only) in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive contracts in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

## METHOD OF PROCUREMENT

### FAR 16.103

Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Only fixed-price and fixed-price with EPA can be used with Sealed Bidding procedures.

Negotiating the contract type and negotiating prices are closely related and should be considered together. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

### FAR 16.202-2

Negotiation of prices or contract type is not necessary when acquiring commercial or commercial type products or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications. A firm-fixed price contract would be the most suitable type for these requirements.

#### Reasonableness of Price Without Discussion

Negotiation of prices is not needed when the contracting officer can establish fair and reasonable prices by establishing:

1. There is adequate price competition
2. There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data
3. Available cost or pricing information permits realistic estimates of the probable costs of performance,
4. Performance uncertainties can be identified and reasonable estimates of the cost impact can be made and the contractor is willing to accept firm fixed price representing assumption of the risks involved.

#### Adequate Price Competition

Adequate price competition exists if:

- two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements and
- these offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

Price competition is considered inadequate and negotiation of price when:

- solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete
- the low offeror has a decided advantage that is practically immune from competition or
- the lowest price received is determined to be unreasonable.

#### Revised Offers

Finally, sealed bidding does not allow bidders an opportunity to revise their bids.

Negotiation methods allow the contracting officer to:

**FAR 15.610(c)(5)**

Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

While all four conditions must be met in order to select sealed bidding, they are not necessarily stand-alone issues. For instance,

- The better able you are at describing your requirement, the less need you will have to hold discussions with offerors and the easier it will be for bidders to establish a firm price.
- Determining whether a bid is fair and reasonable is easier when competition exists and the bidders have sufficient time to establish a firm price and are basing their prices on the same requirement.
- The more time allowed for soliciting offers, the better your opportunity is for obtaining full and open competition and resolving problems with the specification before receipt of bids.

In fact, depending upon how many of the conditions are not met and why will impact not only your decision on noncompetitive or competitive procedures, but which competitive procedure to use.



## METHOD OF PROCUREMENT

### 11.4 Select Method of Procurement

Now that you have evaluated the conditions applicable to the requirement, it is time to select the method of procurement. The requirements for each method are detailed as follows:

#### Sealed Bidding

##### **FAR 4.101**

Congress realized the need for a way to discourage abuses in Government acquisition through a structured, competitive system that would be open to public scrutiny.

- By publicly opening the bids, the Government is much less likely to select a contractor based on favoritism.
- The interested parties can police the actions of the Government to ensure that they have received a fair and impartial opportunity to be awarded the contract.

Sealed bidding requires you to:

1. Prepare an invitation for bids that describes the **requirements clearly, accurately, and completely**. Unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders are prohibited.
2. Publicize the IFBs **in sufficient time** to enable preparation and submittal of competitive bids. [The procedures necessary to carry out sealed bidding require a certain period of time which cannot be shortened. To assure adequate competition, there must be sufficient time after issuance of the IFB and prior to bid opening for all prospective bidders to prepare and submit a bid.]
3. **Publicly open** sealed bids at a predetermined date and time.
4. Evaluate bids **without discussion**.
5. Select the responsible bidder whose bid conforms to the requirements based on **price and price-related factors** only.

The premise of **sealed bidding** is that it is a competition of price among firms in that market. Each firm will give you the best price in order to win the award. Sealed bidding works best when the market believes there will be competition. There is no incentive to bid the best price when a firm knows they are the only source. Therefore, you must have a reasonable expectation that two or more qualified firms will participate in the competition.

## Negotiation

**FAR 15.101**

Unlike sealed bidding, negotiation procedures allow:

- Discussion of proposals with offerors
- Award based on revised offers.
- Procurement of products or services weighted more heavily on the technical capabilities than the price.

Negotiation permits discussion, persuasion, alteration of initial assumptions and positions and allows for give-and-take. Discussion can be applied to:

price	type of contract
quality	delivery
quantity	technical requirements
other terms and conditions	

## Two Step Sealed Bidding

**FAR 14.5**

Two-step sealed bidding combines elements of both sealed bidding and negotiation. This method provides for the

- discussion of technical issues with
- a public opening of the prices for all acceptable technical proposals.

Exhibit 11-2 outlines the conditions applicable to the different methods of procurement.

## METHOD OF PROCUREMENT

CONDITIONS FOR SELECTING THE METHOD OF PROCUREMENT		
<b>Sealed Bidding 6.401</b>	<b>Two-Step Sealed Bidding 14.502</b>	<b>Negotiation 15.101</b>
1. Time permits the solicitation, submission, and evaluation of sealed bids. Publicizing is mandatory.	1. Sufficient time will be available for the use of the two-step method. Publicizing is mandatory.	1. Time is not a factor when publicizing is not mandatory .
2. The award will be made on the basis of price and price-related factors.	2. Definite criteria exists for evaluating technical proposals. Award will be made on price and price-related factors.	2. Award can be made on the basis of cost or price and other factors, or greatest value.
3. It is not necessary to conduct discussions with the responding offerors about their bids.	3. Specifications are not definite or complete. Discussions of the technical aspects of the requirement are necessary.	3. Discussions of any part of the requirement is allowed.
4. There is a reasonable expectation of receiving more than one bid.	4. More than one technically qualified source is expected to compete	4. Lack of competition is only a factor when noncompetitive procedures are used.
5. A firm fixed price contract or a FP with EPA will be used.	5. A firm fixed price contract or a FP with EPA will be used.	5. Any type of contract can be negotiated.

*Exhibit 11-2*

# CHAPTER 12

## PROCUREMENT PLAN

### IT'S TIME TO PLAN

*You are preparing to acquire advisory and assistance services estimated at \$5.5 million. This is one of the largest requirements you've been assigned. After you have reviewed the PR, you must determine what to do next.*

- 1. Is a procurement plan required?*
- 2. Who is responsible for preparing the plan?*
- 3. What should be included in the plan?*

## COURSE LEARNING OBJECTIVES

At the end of this course, you should be able to:

**Overall:** Determine whether a procurement plan is necessary.  
Update or prepare a procurement plan.

**Individual:**

- 12.1 Determine whether a plan is necessary.
- 12.2 Determine if an existing procurement plan applies.
- 12.3 Prepare plan.

# INTRODUCTION TO THE PROCUREMENT PLAN

## What is Procurement Planning?

**FAR 7.105(b)**

Procurement planning refers to the development of a plan of action and milestones by the contract specialist which commences with receipt of the PR and ends with contract award and delegation of contract administration.

The procurement plan is a comprehensive document which serves as the principal tool for the management and monitoring of procurement activities. The plan must be reviewed and revised throughout the procurement cycle, as needed.

It provides an outline of the steps that must be taken to accomplish the procurement, and it specifies how, when, and by whom those steps must be taken. Thus planning provides the framework for satisfying a requiring activity's need in an effective, economical, and timely manner.

## What is Acquisition Planning?

**FAR 7.101**

Acquisition planning, on the other hand, means the

"process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition."

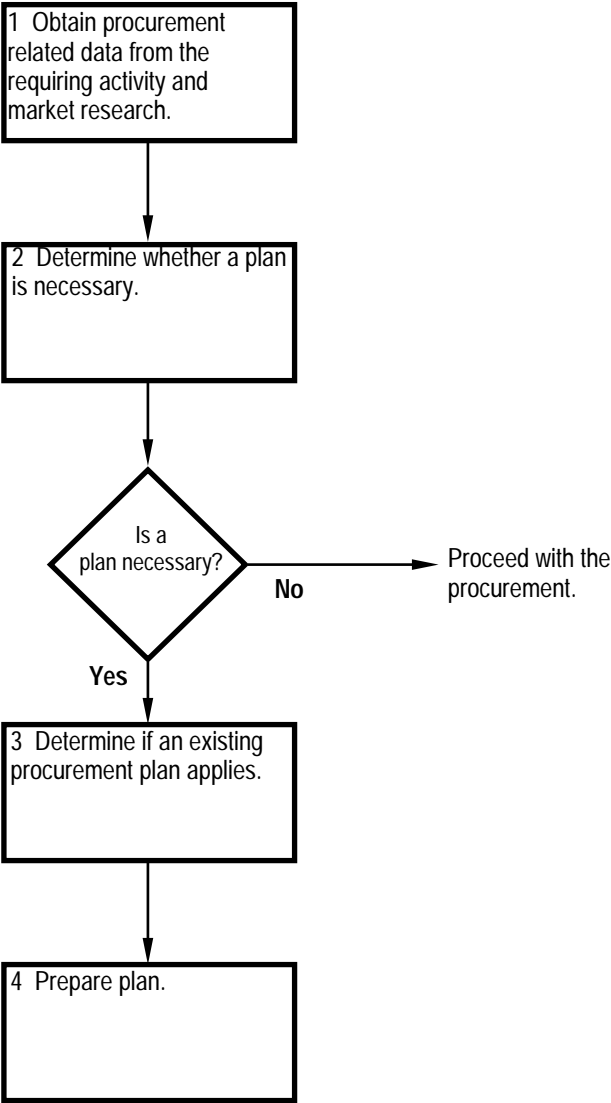
Acquisition planning covers the identification of need and securing of funding by the requiring activity, the procurement of the needed supply or services by the contract activity, quality control by the user, and ultimately disposal or termination.

☞ **NOTE:** For the purposes of this course, only the preparation of a procurement plan will be covered.

## Steps in Performance

The steps in preparing a procurement plan are charted on the next page. Following the flowchart, each step is discussed in turn.

# STEPS IN PREPARING PROCUREMENT PLAN



## STEPS IN PREPARING PROCUREMENT PLAN

### 12.1 Determine Whether a Plan is Necessary

Preparing the procurement plan is the last step of the presolicitation phase. However, you begin planning the steps towards awarding a contract from the moment you receive the purchase request. Procurement planning is discussed at this point because the plan must be complete before you proceed to the solicitation and award phases.

Generally, you will develop a written plan for a complex requirement that will take an extended period of time to award. Whether or not the plan is committed to writing, you are required to:

- Record and document key procurement planning decisions.
- Identify tasks necessary to award contract and key decision points.
- Identify the person or persons responsible for each task.
- Identify officials who are responsible for concurrences, clearances, or approvals.

Generally, criteria and thresholds at which increasingly greater detail and formality in the planning process will be prescribed by agency regulations and policy decisions. Each agency prescribes formats, approval levels and whether plans are written on a system or individual basis. For the purposes of this course, this chapter provides general guidelines on the preparation of a procurement plan.

### 12.2 Determine if an Existing Plan Applies

When conducting your research, analyze previous contract files for the same or similar requirements to determine whether a plan exists.

- You do not need to develop a new plan if there is an existing plan.
- The existing plan may only require a few updates:
 

- dates	- market conditions data
- quantity	- dollar amounts
- set-asides	- source list
- J & A	- D & F

There is no need for you to "reinvent the wheel" for repetitive requirements.

### 12.3 Prepare Plan

When a written plan is required, it should include or address the elements in Exhibit 12-1.



## PROCUREMENT PLAN

<b>TYPICAL ELEMENTS OF A PROCUREMENT PLAN AND ACTIVITY USUALLY RESPONSIBLE FOR PREPARING</b>	
<b>ELEMENT</b>	<b>TASK</b>
1. Specification/Statement of Work*	Include brief description. Address potential problems, issues and recommendations to be resolved.
2. Technical/Business Evaluation Management*	Describe factors for ranking proposals. Identify whether award will be made on basis of lowest price or best value.
3. Source Selection Plan*	Identify potential for multiple awards, price related factors to be evaluated and overall weights on best value vs. price.
4. Recommended Sources***	If appropriate, attach list of sources.
5. Competition***	Address steps that are being taken to increase competition. If sole source, describe justification for restricting competition.
6. Business/Economic Development Program**	Describe consideration given to award as a set-aside.
7. Method of Procurement**	Determine if method is to be Sealed Bidding or Negotiation and the rationale used in selection.
8. Lease vs. Purchase**	Address rationale for determining one or both methods.
9. Type of Contract**	Provide rationale for selection.
10. Government Furnished Property (GFP) Data***	Identify property/data, its impact on competition and difference in total cost to Government with and without GFP.
11. Special Terms/Conditions*	Identify special clauses/provisions (i.e., options, warranties)
12. Contract Administration***	Identify contract performance monitoring required. Attach contract administration plan.
* Requiring activity responsibility ** Contract activity responsibility *** Requiring and contract activities' responsibility	

*Exhibit 12-1*

Exhibit 12-2 lists the steps to follow in devising a procurement plan.

### STEPS IN FORMULATING A PROCUREMENT PLAN

1. Identify key issues from acquisition histories and market research.
2. Identify key decisions applicable to the requirement.
3. Identify Government personnel who will be involved in the acquisition.
4. Prepare the written document.
5. Identify milestones.
6. Provide for approvals/reviews.

*Exhibit 12-2*

#### Identify Issues

Knowing the problem areas will enable you to process the procurement in a timely fashion. Your problems may even come from the requiring activity itself. Be prepared by:

- Reviewing previous acquisition histories and market research data .
- Considering any changes that may have occurred since the last contract.
- Including all the problems in the procurement plan and their resolutions.

Examples of questions you need to consider are:

**Type of contract:** Did the type of contract change in previous procurements?

**Past experiences with this type requirement:** Has this requirement ever been purchased before? What are the current problems associated with this product/service?

**Type of specification:** What type of specification was used to describe the requirement - design, function, commercial item description, brand name or equal, or performance? Have there been any changes in the specifications? Are there any other types of specifications that were used on other contracts?

PROCUREMENT PLAN

**Special provisions/clauses:** Were there any special provisions or clauses needed for the requirement?

**Quantity:** Has the quantity increased or decreased since the last requirement?

**Quality:** Was the customer satisfied with the quality and reliability of product or service?

**Delivery/Shipment:** Did the contractor deliver the product in a timely manner? Can the contractor accelerate delivery if necessary?

You should consider developing a form that illustrates the issues, problems, and resolutions to include in your files for future procurements. A sample form is shown in Exhibit 12-3:

ACQUISITION HISTORY - PROCUREMENT PLAN		
Issue	Problem	Resolution

Exhibit 12-3

## Complete Plan



You may want to consider establishing a file that would include a copy of all the procurement plans in the contracting office. Each plan should be updated after award and again after completion of the contract with a "lessons learned" report.

---

When writing the procurement plan, make sure to include the decisions that were made and describe how you will process the procurement.

- Your agency may have a set format you must follow.
- Absent any agency required format, you may follow the format prescribed in FAR 7.105(b) for a Plan of Action.
- Exhibit 12-4 (pages 12-10 and 12-11) is another, but similar, suggested format.

## Identify Milestones

A milestone schedule is a time table for accomplishing tasks in the procurement plan. You should develop a milestone chart and update it, as needed, to help ensure that all key elements are covered. A sample milestone schedule is shown in Exhibit 12-5 (page 12-12). Coverage of each element must be tailored to the individual procurement.

## Obtain Approvals

The milestone schedule may require certain approvals and coordinations as prescribed by specific agency guidelines. Personnel who may provide you with such approvals and coordinations include:

Legal counsel	Program/requirements manager
Transportation officer	Shipping and packaging personnel
Competition advocate	Accounting and finance personnel
Small business advisor	Quality assurance personnel

As the procurement process progresses, you may find it necessary to shift responsibilities or add tasks that could not have been anticipated at the time of approval. Therefore, maintain a flexible plan so that you may update it to reflect all developments.

## PROCUREMENT PLAN FORMAT

**Statement of need** - briefly describe the need and supply or service.

**Estimated dollar value** - include life cycle cost.

**Applicable conditions** - state all significant conditions affecting the acquisition, such as any known cost, schedule, and capability or performance constraints.

**Acquisition history and market data** - provide synopsis of data collected that relates to the requirement.

**Life cycle cost** - discuss how life cycle costs will be considered, as appropriate.

**Capability or performance** - specify the required capabilities or performance characteristics of the supplies or services being acquired.

**Delivery or performance period requirements** - describe the basis for establishing delivery or performance period requirements. Describe reasons for urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition.

**Risks** - discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals.

**Sources** - Indicate prospective sources of supplies and/or services that can meet the need.

**Competition** - describe amount of competition, if any. If full and open competition is not contemplated, cite the authority for the use of other than full and open competition, including small, disadvantaged and labor surplus area concerns. Indicate whether the product is commercial or commercial-type. Describe how competition will be sought for future procurements.

**Source selection procedures** - discuss timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the procurement objectives.

*Exhibit 12-4*

**PROCUREMENT PLAN FORMAT (CONT.)**

**Contracting considerations** - Discuss contract type selection; use of multiyear contracting, options, or other special contracting methods; any special clauses, special solicitation provisions; or FAR deviations required; whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase and why; and any other contracting considerations.

**Budgeting and funding** - Discuss type of funds and budget considerations.

**Contractor vs. Government performance** - Address the consideration given to OMB Circular No. A-76.

**Management information requirements** - Describe, as appropriate, the management system that will be used by the Government to monitor the contractor's effort.

**Government-furnished property (GFP)** - Indicate any property or material to be furnished to the contractor, including the availability to schedule for the acquisition of GFP.

**Environmental considerations** - Discuss environmental issues associated with the acquisition.

**Security considerations** - Discuss how adequate security will be established, maintained, and monitored for classified matters.

**Other considerations** - Discuss energy conservation measures, standardization concepts, foreign sales implications, as applicable, and any other matters germane to the plan not covered elsewhere.

**Milestones** - Address procurement steps and schedule.

**Identification of participants** - List the individuals who participated in preparing the procurement plan giving contact information for each.

*Exhibit 12-4 (cont.)*

## PROCUREMENT PLAN

PROCUREMENT MILESTONE SCHEDULE				
Contract Specialist:		Buyer Code:		
Req. No.:		Received Req:		
Requiring Act:		Priority:		
Supplies/Services:		Negotiation Procedures:		
Solicitation No:		Contract Type:		
Est. Dollar Amt:		Type of Funds:	Funds Expiration Date:	
Avg. Palt Days:		Current Contract:	Expiration Date:	
EVENT	RESPONSIBILITY	PROJECTED DATES	REVISED DATES	ACTUAL DATES
1. Funding 2. Small Business/8(a) Review 3. Final Specs/SOW 3. Quantity 4. Quality 5. Packaging/Marking 6. Inspection/Acceptance 7. Deliveries or Performance 8. Special Provisions/Clauses 9. Sources 10. Source Selection Plan/Factors 11. Special Approvals (technical, etc) 12. Justifications/Approvals (legal, etc) 13. Preparation of PR 14. Presolicitation Conference 15. Determination & Findings 16. Synopsise in CBD 17. RFP Released 18. Preproposal Conf. 19. Issue Clarifications/Changes 20. Closing Date 21. Request Tech Eval. 22. Receive Tech Eval. 23. Initiate Audit Request 24. Receive Audit Results 25. Price/Cost Analysis 26. Competitive Range 27. Subcontract Plan 28. Negotiations 29. Request Best & Final Offer (BAFO) 30. Receive BAFO's 31. Complete evaluation of BAFO 32. Conduct Preaward Survey 33. EEO Clearance 34. Analyze Contractor Responsibility 35. Final Contract Document 36. Legal Review 37. Contract Clearance 38. Notification of Award 39. Debriefing 40. Notice to Proceed 41. Administration Assigned 42. Other				

Exhibit 12-5

**APPENDIX  
TO  
PROCUREMENT PLANNING**

**EXCERPTS FROM THE FEDERAL ACQUISITION PROCESS**

FEDERAL ACQUISITION INSTITUTE

CURRICULUM OF PROCUREMENT  
TRAINING COURSES

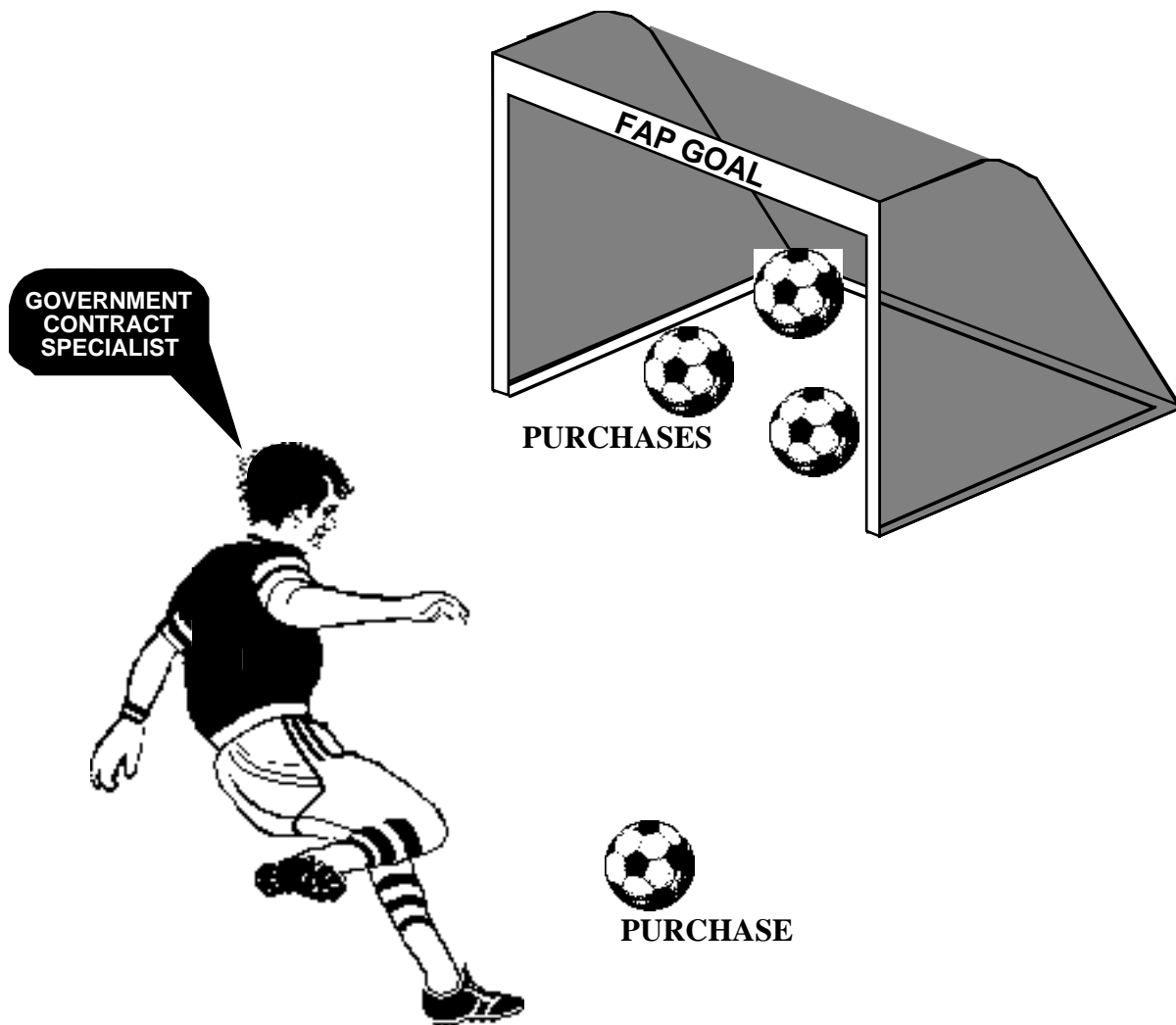
CURRENT THROUGH  
FAC 90 - 8

**OFFICE OF ACQUISITION POLICY  
GENERAL SERVICES ADMINISTRATION**



# CHAPTER 1

## GOALS OF THE FEDERAL ACQUISITION PROCESS



**Score a goal with your purchase to  
achieve the FAP goals !!!**

### **Learning Objectives**

- 1-1 Identify and define the goals of the Federal Acquisition Process.
- 1-2 Describe four environmental factors that affect the Government's ability to accomplish goals of the acquisition process.
- 1-3 Summarize Congressional statements of procurement policy in 10 U.S.C. 2301 and 41 U.S.C. 401.

*Exhibit 1-1. Learning Objectives.*

## **CHAPTER INTRODUCTION**

This chapter articulates the goals for the Federal acquisition system. It also surveys environmental forces that affect your ability to accomplish the goals.

## 1.1 GOALS OF THE FEDERAL ACQUISITION PROCESS

Why acquire supplies and services? The Government resorts to the acquisition process when supplies or services are necessary to its missions and cannot be provided more cost-effectively in-house.

How does one judge the Government's success in acquiring needed supplies and services? This question is often viewed as relevant only to the contracting (purchasing) office. Yet, the contracting office is only one of the many organizations that play a role in the acquisition process. Hence, the goals of the acquisition system should be conceived broadly and should encompass the contribution of all parties to the process—including requiring activities, audit activities, budget activities, and the like. What are the goals of this process?

### THE PREAWARD GOAL

Obtain the optimum market response to requirements for supplies and services, in terms of:

- Quality.
- Timeliness.
- Cost.

While:

- Minimizing business and technical risks.
- Accomplishing socioeconomic objectives.
- Maximizing competition.
- Maintaining integrity.

*Exhibit 1-2. The Preaward Goal.*

## 1.2 THE PREAWARD GOAL

The preaward goal of the acquisition process is to obtain the optimum market response to the Government's requirements for supplies and services. What is optimum? Providing requiring activities with exactly what is needed (i.e., quality), when it is needed (i.e., timeliness), at a fair and reasonable price, while, at the same time, serving the Government's long-term interests by:

- Minimizing the risks inherent in the acquisition.
- Advancing the Government's socioeconomic policies.
- Encouraging quality suppliers to continue doing business with the Government.
- Maintaining absolute integrity in all dealings with the private sector.

Typically, most contracts involve tradeoffs between these various goals. Hence the word "optimum."

### 1.2.1 Quality

FAR Parts 10, 11, & 15.605
----------------------------------

Quality means the extent to which the actual minimum needs of the end users are satisfied.

The Federal Acquisition Regulation (FAR) requires that quality "be addressed in every source selection."<sup>1</sup> This is done in part by:

- Defining the need in functional terms,
- Describing the performance and/or design characteristics that are necessary to satisfy the need (e.g., height, weight, energy usage, reliability, maintainability, useful life, etc.).
- Prescribing standards for determining whether a deliverable is acceptable (i.e., meets the need as defined in the contract), and
- Establishing inspection and testing procedures for measuring the deliverable against those standards.

The FAR further allows the use of quality as a factor in evaluating competing contractors. For that purpose, the FAR states that quality may be expressed in terms of technical excellence, management capability, personnel qualifications, prior experience, past performance, and schedule compliance.

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<sup>1</sup> By "source selection" is meant the selection of an offeror for the award of a contract in competitive acquisitions.

## GOALS OF THE FEDERAL ACQUISITION PROCESS

The bottom line on quality, however, is not how well the Government has defined the end user's need in its specification and evaluation factors. Rather, quality is a question of whether the deliverable, after it is put into service, accomplishes the function for which it was acquired.

### 1.2.2 Timeliness

With respect to supplies, timeliness means delivering the requisitioned supplies to the end user in the quantity and at the time necessary for the end user's purposes. With respect to services, timeliness means performance at the time necessary for the end user's purposes.

When planning to meet an agency's needs, you must consider the time it takes to:

- Prepare specifications and purchase descriptions.
- Obtain funding and administrative approvals for purchase requests.
- Solicit offers, make source decisions, and award contracts.
- Complete, inspect, and accept the work.

When the requirement is for supplies, you must also factor in time for:

- Shipping and distributing supplies to the Government.
- Receiving and inventorying the supplies.
- Physically distributing supplies to the end users.

In addition, forecasts of time required for an acquisition should be cast in terms of probability—given the risk of delay that is inherent in any acquisition.

The bottom line for timeliness is whether the end user has the supplies in hand (or has had the benefit of the requisitioned services) when, and where, and in the quantity required for his or her mission. Otherwise, the mission will either be delayed or not accomplished.

## CHAPTER 1

### 1.2.3 Cost

The cost of supplies or services is more than just the price (i.e., dollar amount) of the contract. Other costs include:

- Any direct costs for acquiring the supplies or services not covered in the contract price (e.g., the cost of delivery when the contract provides for FOB Origin, under which the buyer pays the cost of shipping and risk of loss during transportation).
- Any cost of ownership not covered in the contract price (e.g., the cost of installation, inventory management, spares, maintenance, repairs, training, disposal, etc.).
- The Government's overhead for awarding and administering the contract (e.g., the salary costs of employees who prepare specifications, develop purchase requests, evaluate offers, determine responsibility, execute contracts, inspect and accept deliverables, etc.).

For example, two companies propose to offer products that meet both performance and quality requirements. The product of Company A requires more electricity than the product of Company B. However, Company A's purchase price is 10% less. Whether Company A's offer represents the best value is not only a matter of the purchase price but also of the net present value of the cost of electricity over the useful life of the product.

In short, the bottom line for any deliverable is the total cost of both acquisition and ownership, including the Government's overhead. Since the contract price is only one element of that cost, you should be wary of judging an acquisition by that cost alone.

### 1.2.4 Minimizing Business, Financial, and Technical Risks

In a contractual relationship, both parties want to achieve their desired objectives. When the risks associated with those objectives are perceived as being too high or unfairly apportioned, either or both of the parties may be unwilling to enter into the contract.

For the contractor (seller), the principal business or financial risk is the loss of money on the contract. No firm can forecast the cost of doing work under a contract with absolute certainty. There will always be such potential perils as strikes, equipment malfunctions, turnover of key personnel, financial setbacks (e.g., if the firm's bonds take a tumble), defective parts, bottlenecks in the availability of raw or semi-finished

## GOALS OF THE FEDERAL ACQUISITION PROCESS

goods, general inflation, unexpectedly long learning curves, and the like. Absent specific protection against such perils in other terms and conditions of the contract, offerors may inflate proposed prices to cover the “worst case” scenarios.

For the Government, the principal business risk is payment of an unreasonable price for the work (e.g., a price substantially higher than the actual cost of performance). This might happen, for instance, if the contract price had been inflated to protect the contractor from worst case scenarios that never materialized.

For the contractor, technical risks are strongly related to financial risks. Any problem in meeting technical requirements might require more effort (labor and material costs) than was contemplated at the time of the agreement on price. The contractor may even discover that the work is literally impossible at any price. From the Government’s standpoint, technical risk goes beyond financial impact: The agency’s very mission may be at risk. Examples of technical risks are shown in Exhibit 1-3.

### TECHNICAL RISKS

- That the contractor will fail to deliver or will not deliver on time.
- That the final deliverable will not satisfy the Government’s actual need, whether or not “acceptable” under the terms and conditions of the contract.
- That the Government’s need will change prior to receipt of the deliverable.

*Exhibit 1-3. Technical Risks.*

When purchasing standard commercial (off-the-shelf) supplies and services, the risks to both parties—both business and technical—tend to be minimal. However, when the work becomes more complex or uncertain (e.g., building to a new Federal or military specification or conducting research and development), risk may become a significant factor in establishing and negotiating the terms and conditions of the contract. Absent some reasonable allocation of risk, one or both of the parties may be unwilling to enter into a contract. Consequently, over the years, the Government has developed a number of solicitation provisions, contract clauses, and contract forms that are intended to mitigate specific types of risk. Examples are listed in Exhibit 1-4.

<b>EXAMPLES OF PROVISIONS, CLAUSES, AND FORMS THAT MINIMIZE RISK</b>		
<i>Clause or provisions</i>	<i>Purpose (in part)</i>	<i>Minimizes the risk of:</i>
Contract Award FAR 52.214-10 and 52.215-16)	Provides for rejecting offers from offerors who cannot affirm their capability to perform.	Default and/or unsatisfactory performance.
Economic Price Adjustment Labor and Materials (FAR 52.216-4)	Allows adjustments in the contract price if rates of pay for labor or the unit prices for materials shown in the schedule either increase or decrease.	Unexpectedly high rates of inflation or deflation in the market prices of labor or supplies that are critical to contract performance.
Performance Bond (SF 25)	Requires the contractor to guarantee repayment (e.g., through a surety) of excess costs of repro-curing an item if it defaults.	Acquiring from markets (e.g., construction) that have experienced unusually high rates of business failure.
Advance Payments (FAR 52.232-12)	Allows the Government to provide the contractor with startup funds prior to the commencement of work on the contract.	Impossibility of performance, if private sector financing is not likely to be available in the required amount or at a reasonable rate of interest.
Warranty of Supplies of a Noncomplex Nature (FAR 52.246- 17)	Requires contractors to repair or replace a defective item during a specified period after acceptance (or provide other consideration).	Unsatisfactory performance during the useful life of the item.

*Exhibit 1-4. Examples of Provisions and Clauses That Minimize Risk.*

### 1.2.5 Socioeconomic Objectives

The Federal Government annually expends billions of dollars to acquire supplies and services. In its 1972 report to the Congress, the Commission on Government Procurement noted that:

“...the magnitude of the Government’s outlays for procurement and grants creates opportunities for implementing selected national policies. The opportunities lie in the disciplining effect which the Government can exert on its contractors and grantees. It can require, for example, that suppliers maintain fair employment practices,



## GOALS OF THE FEDERAL ACQUISITION PROCESS

provide safe and healthful working conditions, pay fair wages, refrain from polluting the air and water, given preference to American products in their purchases, and promote the rehabilitation of prisoners and the severely handicapped.”

For instance, the Small Business Act has established a policy of placing a fair proportion of Federal acquisitions with small business and small disadvantaged business concerns. Examples of other socioeconomic goals are listed in Exhibit 1-5. In most cases, these goals are met by incorporating the corresponding clauses in Government contracts and enforcing those clauses. In some cases, subcontracts also contain clauses that require subcontractors to achieve or attempt to achieve the stated objectives.

<b>EXAMPLES OF SOCIOECONOMIC OBJECTIVES</b>	
<i>Objective</i>	<i>Required By</i>
Utilize business firms in Labor Surplus Areas	Small Business Act U.S. Dept. of Labor Regulations Defense Manpower Policy No. 4B
Pay prevailing wages for work on Government contracts	Walsh-Healey Public Contracts Act Davis-Bacon Act Service Contract Act
Clean the environment	Clean Air Act Clean Water Act
Provide employment opportunities for American workers	Buy American Act
Ensure equal employment opportunity	Executive Order 11246 Executive Order 11141
Promote the hiring of veterans	Veteran's Preference Act

*Exhibit 1-5. Examples of Socioeconomic Objectives  
and the Legal Action(s) that Require Them.*

## CHAPTER 1

### Socioeconomic Goals in the Private Sector

Commercial and industrial concerns also consider social and economic objectives in their acquisition procedures. For example, private sector entities often:

- Promote the use of small and small disadvantaged suppliers.
- Assist minority-owned business concerns (suppliers and vendors).
- Use American-made over foreign-made products.
- Prefer local suppliers over suppliers from other geographic locations.

### 1.2.6 Maximizing Competition

Often, maximizing competition is viewed as a matter of numbers—how many offers did the Government receive for a given requirement? But, what if the most efficient, economical, and highest quality suppliers decline to submit offers? What if the only offers received are from the marginal and inefficient producers? Because of these potential situations, competition is not merely a matter of numbers. Rather, maximizing competition means:

- Building and maintaining a base of responsible suppliers who are willing and able to compete for Government contracts.
- Encouraging those suppliers to research and invest in new manufacturing technologies and product innovation where such research and investments would help the Government more effectively and economically accomplish its missions.
- Broadening the industrial and mobilization base, in the event that the Government needs to rapidly build up the armed forces.

The Government has employed a variety of strategies for accomplishing these subgoals, including:

- Dual sourcing — awarding part of a requirement to one source and another part to a second source.
- Obtaining data or rights to data (designs, specifications, etc.) from one source for use by other sources in competing for future requirements.
- Permitting companies to include (by agreement) independent research and development (IR&D) costs in their indirect costs charged to Government contracts.
- Funding innovative research efforts by small business concerns.

### 1.2.7 Maintaining Integrity

Frequently, a contractor's protest of a contract award activates the need to "protect the integrity" of the Federal acquisition process. Basically, in Government contracting, integrity means:

- Dealing fairly and in good faith. For example, in negotiated acquisitions, CO's may not use "auctioning" techniques, "technical levelling", or "technical transfusion"<sup>2</sup> to, in essence, play one offeror against another.
- Maintaining impartiality and avoiding preferential treatment.
- Avoiding any appearance of conflict of interest or in any other way compromising public trust in the Federal acquisition system.

Chapter 10 of this text deals extensively with ethics, conflicts of interest, and other matters that, collectively, relate to integrity.

### 1.2.8 Tradeoffs

When contracting for goods and services, you must often make tradeoffs between the goals and seek an optimum business solution. The following are among the many tradeoffs to consider:

#### Between Quality and Cost

When preparing and reviewing specifications and purchase descriptions, one important consideration is the tradeoff between cost and the different alternatives for satisfying the Government's minimum need. For example, in one acquisition, a requiring activity specified that impellers for a pump be cast from stainless steel. However, it turned out that cast iron would have been as reliable and effective as stainless steel at a fraction of the cost. Thus, quality cannot be considered without regard to cost, just as cost cannot be considered without regard to quality.

#### Between Timeliness and Cost

One way of ensuring that supplies are available when and where needed is to stockpile large quantities in Government warehouses. From the standpoint of the contracting activity, a savings is also realized by placing one large order rather than issuing a separate order each and every time the end user requires the item on-the-job.

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<sup>2</sup> "Auction" techniques includes (1) indicating to an offeror a cost or price that must be offered to receive further consideration, (2) advising an offeror of its price standing relative to another offeror, and (3) otherwise furnishing information about other offerors' prices. "Technical Leveling" means helping an offeror bring its technical proposal up to the level of other proposals through successive rounds of discussion. "Technical Transfusion" means disclosing technical information supplied by one offeror to other offerors.

On the other hand, inventories are costly to maintain and are subject to “shrinkage” (i.e., theft, deterioration, misplacement, etc.). From the standpoint of inventory costs alone, the Government would prefer to order on a “just-in-time” basis, as often as necessary to meet the end user’s immediate need—and keep no inventory on hand.

Hence, the optimum ordering quantity is a matter of minimizing ordering and inventory costs, taken together, as follows:

$$EOQ = \sqrt{\frac{2SR}{CK}}$$

Where

EOQ = Economic Order Quantity

S = Cost of preparing and awarding the contract or delivery order.

R = Total quantity required for the year.

C = Price per unit.

K = The cost of carrying one unit in inventory for one year, as a percentage of C.

For example, if:

S=\$300

R= 5,000 Units

C = \$100

K = 20%

Then:

$$EOQ = \sqrt{\frac{2 \times \$300 \times 5000}{\$100 \times .2}}$$

and the Economic Order Quantity = 387 units. From the standpoint of lowest total cost—considering both ordering and inventory costs together, 387 is the precise quantity to order when the Government’s warehouses run out of the units.

If, in this example, timeliness were the overriding goal, then the Government would make one purchase of 5,000 units at the beginning of the year. If cost is the overriding goal, then the Government would order in lots of 387.

Reality is not quite so simple. This decision can become more complicated when you factor in such variables as (1) the availability of quantity discounts, (2) long-term or cyclical trends in unit prices, and long-term trends in availability (i.e., will the items be available at any price?).

## GOALS OF THE FEDERAL ACQUISITION PROCESS

There are other potential tradeoffs, with respect to timeliness, beyond inventory levels. For instance, there are tradeoffs between cost and delivery terms. If the Government pushes for delivery in half the time that is customary in that market, the tradeoff might be a higher award price.

### Between Risk and Cost

At times, minimizing the contractor's risks may help reduce the eventual award price. For instance, if the Government is willing to protect a contractor from inflation through an Economic Price Adjustment clause, proposed prices should exclude any contingency for such inflation. Likewise, if the Government is willing to financially assist the contractor (e.g., advance payments), the result should be prices that exclude the corresponding cost of private sector capital.

At other times, minimizing risks may result in a higher award price but a lower total cost for the supplies or services. For example, the Government may require the contractor to furnish a warranty. In that case, the contractor would propose an award price that covers its expected costs for repairs over the warranty period. This would be in the Government's interests if the net increase in the award price is less than the net present value of the expected cost of repairs that the Government would otherwise incur over that same period.

Finally, the Government may be willing to pay a higher price to reduce the risks of default, unsatisfactory or marginal performance, and the like. For instance, the Government is willing to pay a higher price to a responsible firm than gamble on a company that cannot affirm its responsibility. Likewise, the Government may be willing to pay a higher award price to a firm which, based on an evaluation of its relative technical and business management strengths, is more likely than a competitor to succeed in meeting the Government's objectives.

These are but a few of the many examples of potential tradeoffs between risk and cost.

### Between Socioeconomic Objectives and Cost

The Government often pays a premium, explicitly or implicitly, to accomplish socioeconomic goals. For instance, the Buy American Act authorizes the Government, under certain circumstances, to pay a higher price for domestic made goods vis-a-vis foreign made goods. Moreover, socioeconomic requirements may add to the Government's overhead for contracting surveillance and reporting (e.g., to monitor compliance with labor laws).

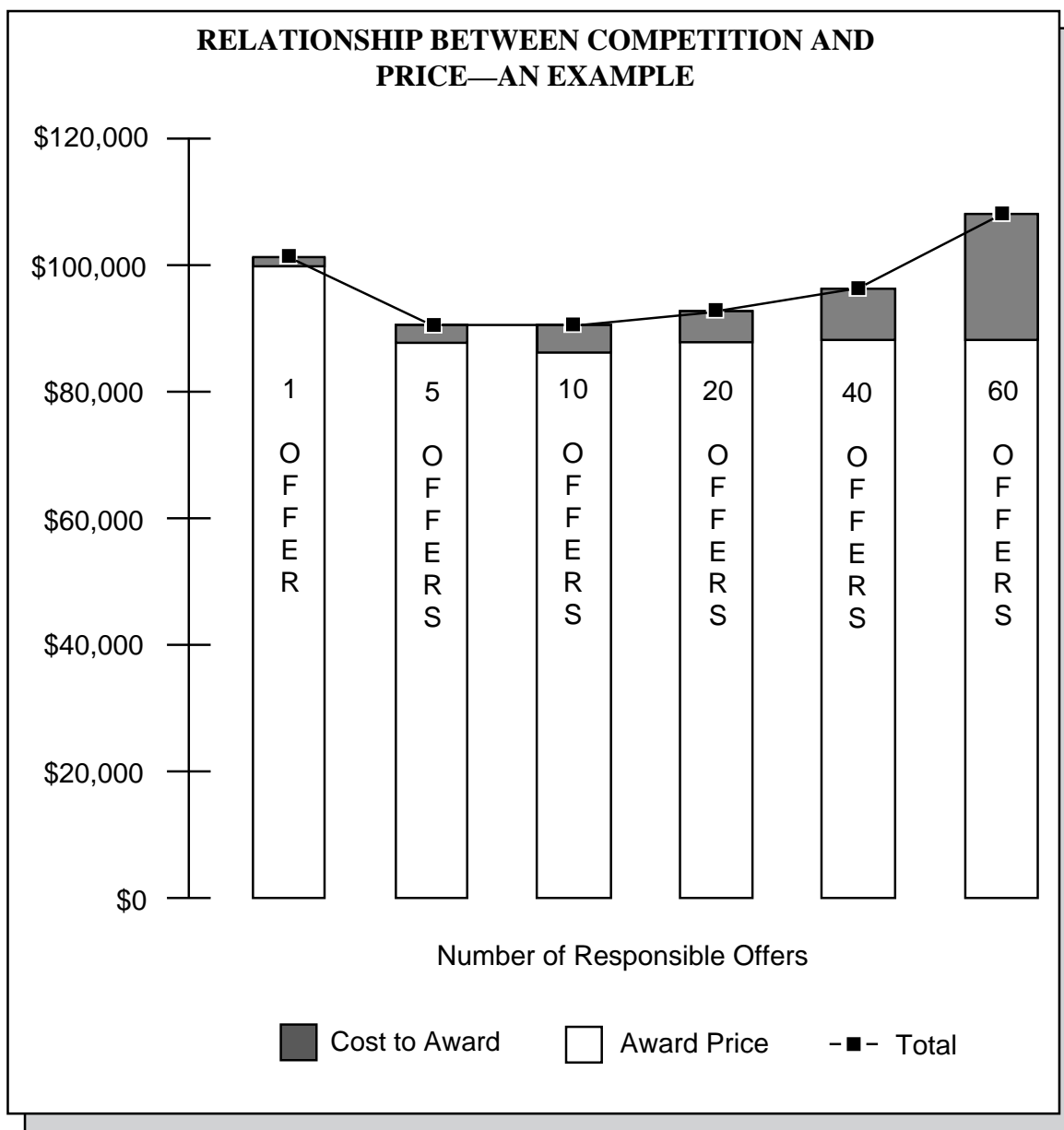
On the other hand, socioeconomic programs have contributed to accomplishing other goals of the Federal acquisition process. For example, the small business program has been effective in creating new sources of supply, thus maximizing competition.. Another example is the improvement in workforce capabilities and productivity brought about by occupational, health, safety, and wage rate laws. These laws help prevent accidents that are costly and delay work while encouraging better qualified persons to seek jobs coming under the wage rate laws.

At times, socioeconomic goals are blamed for problems with quality or cost control that in fact result from failings in acquisition planning, market research, and the like. Socioeconomic objectives are no excuse for shortcomings in accomplishing other goals of the Federal acquisition process—socioeconomic factors are, after all, never the only factors in determining the optimum market response for the Government’s requirements.

#### Between Competition and Cost

The primary benefit of competition is its demonstrated success in reducing award prices. On the other hand, this benefit of competition is subject to diminishing returns. And, the Government incurs an additional cost for every offer it considers (e.g., the salary expenses of Government workers who read the offer, technically evaluate it, apply price-related factors, and—if the offer has a reasonable prospect for award in negotiated acquisitions—discuss it with the offeror). This suggests that there is an optimum level of competition for any given acquisition, as illustrated in Exhibit 1-6. This also suggests that there are practical limits to a Contracting Officer’s search for additional vendors to extend open market mailing lists.

There may also be an inverse relationship between the goals of minimizing risk and maximizing competition. If minimizing technical risk was the only goal of the acquisition process, the Government would tend to award only to the offeror or offerors who successfully performed the same or similar work on previous contracts with the Government.



Between Integrity and Cost

In the short run, tactics such as auctioning and technical leveling could probably win lower prices for the Government. In the long run, such tactics would tend to drive good firms out of the Government market — leaving behind firms who play by equally unscrupulous rules. Thus, playing fair in the long run is not only honorable but also makes good business sense.

Tradeoff Analysis

In short, every goal has its cost. Sometimes that cost is a matter of law and regulations and, as such, is beyond tradeoff analysis. At other times,

however, the success of an acquisition can be measured in part by the degree to which the contract represents the optimum market response to the Government's requirement—all goals of the process taken as a whole.

### 1.3 THE POSTAWARD GOAL

The postaward goal is described in Exhibit 1-7.

POSTAWARD GOAL
Assure that purchased supplies and services are:
<ul style="list-style-type: none"><li>• Delivered or performed when and where specified in the contract.</li><li>• Acceptable, in terms of conforming to the contract's specifications or statement of work.</li><li>• Furnished in compliance with other terms and conditions of the contract.</li></ul>

*Exhibit 1-7. Postaward Goal.*

This goal will largely be addressed in Chapters 8 and 9.

### 1.4 ENVIRONMENTAL FACTORS

The Government's ability to accomplish the goals and objectives of the acquisition process is a function of environmental opportunities, trends, and constraints. The Federal acquisition process is influenced by a number of basic environmental forces, including:

- Market Forces.
- Legal Forces.
- Internal Forces.
- Political Forces.



### 1.4.1 The Market Environment

The market (i.e., market forces and conditions) largely determines:

- Whether or not the Government can fulfill its needs at all and the level of quality that can be achieved.
- The timeliness of fulfillment.
- Cost of the supplies or services.
- Risks inherent in the acquisition.
- Degree to which socioeconomic objectives can be accomplished and alternatives for accomplishing them.
- The level and nature of competition for the acquisition.
- The potential tradeoffs between quality, timeliness, and cost.

A list of factors that affect market environment is presented in Exhibit 1-8. Of these, the most significant is the “law” of supply and demand.

#### KEY MARKET CHARACTERISTICS

- Commercial specifications and industry standards.
- Availability of commercial products to meet Government needs.
- Trends in technology.
- Trends in supply/demand.
- Other factors that affect market prices (e.g., cost of money, raw materials prices).
- Production and delivery lead times.
- Other terms and conditions characteristic of the market.
- Number of firms in market.
- Characteristics of the supplier base, in terms of such factors as:
  - Market shares and niches.
  - Market/corporate strategies.
  - Product lines and features.
  - Patent and data rights.
  - Product reliability and history.
  - Production capability and capacity.
  - Distribution and support capabilities.
  - Interest and willingness to compete for Government work.
  - Financial strength.
  - Eligibility for the 8(a) program or for small business, small/disadvantaged business, or labor surplus area set asides.
- Laws and regulations peculiar to that market.

*Exhibit 1-8. Key Market Characteristics.*

Some supplies and services are required only by the Government and have no commercial counterparts (e.g., weapons systems). In this situation, the Government creates a marketplace which is generally limited in scope and competition, to which it may become “captive.”

### **1.4.2 The Political Environment**

The political environment, for the purposes of this chapter, refers to the interactions between the three principal branches of the Government and the public at large with respect to the Federal acquisition process. These interactions tend to focus on:

- Legislative authority for the program or programs to be supported by the acquisition.
- Appropriations for the program or department that would fund the acquisition.
- Statutes that govern the acquisition process generally.
- Congressional oversight of specific programs or the acquisition process in general.

Every acquisition is, in part, a function of the political environment, if only because the acquisition (1) ultimately supports a program or programs established through the political process and (2) is conducted according to policies and rules that, to a large extent, have been established through that same process.

The larger the acquisition, the more likely it is to be directly influenced by political considerations. The Congress may take a direct interest in an acquisition, for example, in its impact on constituents. The President may take a direct interest in the acquisition, in terms of its impact on the Federal budget and his or her own priorities. Special interests may lobby both the executive and legislative branches to fund the acquisition, overturn it, or steer it to certain companies or regions of the country.

In short, politics—directly or indirectly—ultimately determine what is bought and, directly or indirectly, play a role in determining how and from whom it is bought.

### **1.4.3 The Legal Environment**

The Federal acquisition process is further influenced in its workings by the legal environment. This is not unique to the Federal acquisition process. Much of the subject matter of any business law course has to do

#### GOALS OF THE FEDERAL ACQUISITION PROCESS

with the law of agency and the law of contracts. There are many parallels in contract law in terms of the applications to private sector firms vis-a-vis Federal contracts. These include the following:

Authority to execute contracts	Only a duly appointed Contracting Officer (CO), acting within the scope of his or her authority, may enter into a contract on behalf of the Government.
Approvals	In some cases, even though a CO is acting within his or her authority, a contract may not be binding on the Government unless required approvals have been obtained.
Apparent authority	The Government is not bound by the unauthorized acts of its agents. This “doctrine” often comes into focus when there is a question as to whether the actions of a person representing the CO, (e.g., a contracting officer’s technical representative) are binding on the Government.
Contract clauses	Many clauses found in Government contracts are not normally found in private sector contracts or depart significantly from terms and conditions customary in the private sector. The “Changes—Fixed Price” (FAR 52.243-1), “Audit—Negotiation” (FAR 52.215-2), and “Disputes” (FAR 52.233-1) clauses are examples.
Funding	Funds appropriated by Congress may be used only for the purposes for which they were appropriated.
Whom to contract with	Many laws and regulations that place constraints on an offeror’s eligibility to receive a Government contract are unique in whole or in part to Government contracting.
Steps in the acquisition process	In general, the process of soliciting and awarding Federal contracts is prescribed in far greater detail in law and regulations than private sector contracting. Moreover, offerors may utilize unique procedures and forums for protesting Federal contract awards if these are not made according to those laws or regulations.

#### **1.4.4 The Internal Environment**

Internal environment refers to the interactions of various organizations and officials within a department or agency with respect to the Federal acquisition process.

Agencies (agency head) have some flexibility in organizing the agency and managing it (organizational structure, delegation of management authority). In addition, many provisions of the FAR permit agencies to

decide at what level or who (delegations of authority) will make judgments or exercise authority with respect to a given contract-related decision.

Among the internal factors that affect the performance of the acquisition system:

- The organization's mission, and the primary types of supplies or services required for that mission.
- Delegations of authority, both de jure and de facto (e.g., who are the decision makers, and what do they have the authority to decide?).
- The quality of personnel, in terms of their knowledge of acquisition tasks, skill at performing those tasks, and ability to exercise delegated authority.
- Staffing levels (e.g., ratio of contract specialists to contract actions and the number of staff hours available for each action).
- Internal controls and oversight (e.g., who evaluates performance, what critical factors and standards of performance are applied, who audits performance, and how is work sampled and reviewed, etc.).

## **1.5 CONGRESSIONAL POLICIES FOR ACQUIRING SUPPLIES AND SERVICES**

Many statutes prescribe policies pertaining to Federal acquisition (Chapter 3, Basic Statutes and Regulations). For example, annual defense authorization and appropriations bills contain numerous policy statements and procedural requirements. However, the most fundamental statements of overall policy for the acquisition system are to be found in:

- The Office of Federal Procurement Policy Act (41 USC 401), which applies to all executive agencies.
- The Armed Services Procurement Act (10 USC Chapter 2301), which basically applies to all Defense agencies and NASA.

Neither of these acts articulates a set of goals as such for the Federal acquisition system. Rather, the acts prescribe overall policies for promoting economy, efficiency, and effectiveness in the acquisition of property and services. The following is a summary of these sections.

**STATUTORY POLICIES FOR ACCOMPLISHING SYSTEM GOALS**

**41 USC 401**

It is the policy of the Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government, by:

- (1) Promoting full and open competition.
- (2) Establishing policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost.
- (3) Promoting the development of simplified, uniform procurement processes.
- (4) Promoting the participation of small business concerns.
- (5) Supporting the continuing development of a competent, professional workforce.
- (6) Eliminating fraud and waste in the procurement process.
- (7) Eliminating redundant administrative requirements placed on contractor and Federal procurement officials.
- (8) Promoting fair dealings and equitable relationships with the private sector.
- (9) Ensuring that payment is made in a timely manner and only for value received.
- (10) Requiring, to the extent practicable, the use of commercial products to meet the Government's needs.
- (11) Requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract.
- (12) Ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements.
- (13) Promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required.

*Exhibit 1-9. Statutory Policies for Accomplishing System Goals (41 USC 401).*

**STATUTORY POLICIES FOR ACCOMPLISHING SYSTEM GOALS**

**10 USC 2301**

- (a) The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of the Congress that —
- (1) Full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter.
  - (2) Services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multi-year contracts, that will promote the interest of the United States.
  - (3) Contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.
  - (4) Contracts for advance procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if feasible and practicable, be entered into in a manner to achieve economic-lot purchases and more efficient production rates.
  - (5) The head of an agency uses advance procurement planning and market research and prepares contract specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.
  - (6) The head of an agency encourages the development and maintenance of a procurement career management program to ensure a professional procurement work force; and
  - (7) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed-bid procedures, does not include in such solicitation a clause providing for the evaluation of prices under the contract for options to purchase additional supplies or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.
- (b) Further, it is the policy of Congress that procurement policies and procedures for the agencies named in section 2303 of this title shall in accordance with the requirements of this chapter—
- (1) Promote full and open competition.
  - (2) Be implemented to support the requirements of such agencies in time of war or national emergency as well as in peacetime.
  - (3) Promote responsiveness of the procurement system to agency needs by simplifying and streamlining procurement processes.

*Exhibit 1-10. Statutory Policies for Accomplishing System Goals (10 USC 2301).*

## GOALS OF THE FEDERAL ACQUISITION PROCESS

- (4) Promote the attainment and maintenance of essential capability in the defense industrial base and the capability of the United States for industrial mobilization.
- (5) Provide incentives to encourage contractors to take actions and make recommendations that would reduce the costs to the United States relating to the purchase or use of property or services to be acquired under contracts.
- (6) Promote the use of commercial products whenever practicable.
- (7) Require descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.
- (c) Further, it is the policy of Congress that a fair proportion of the purchases and contracts entered into under this chapter be placed with small business concerns.

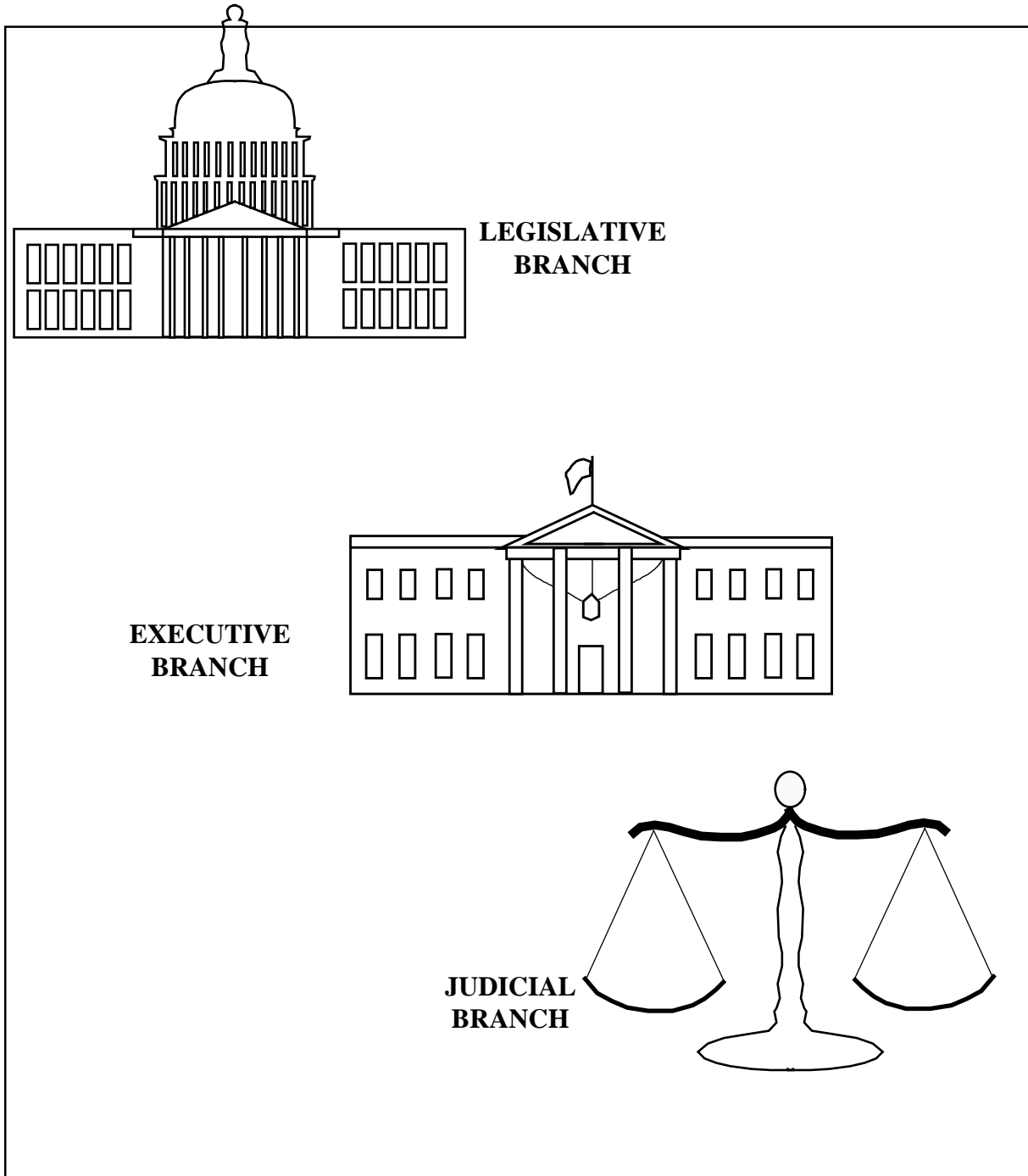
*Exhibit 1-10. Statutory Policies for Accomplishing System Goals (10 USC 2301) (Continued).*

## CHAPTER 1



# CHAPTER 2

## ORGANIZATIONAL ROLES AND RESPONSIBILITIES



### **Learning Objectives**

- 2-1 State the role of the legislative branch of Government relative to the acquisition process.
- 2-2 State the role of the executive branch of Government relative to the acquisition process.
- 2-3 State the role of the judicial branch of Government relative to the acquisition process.
- 2-4 State the role of the public and non-Government organizations in the acquisition process.

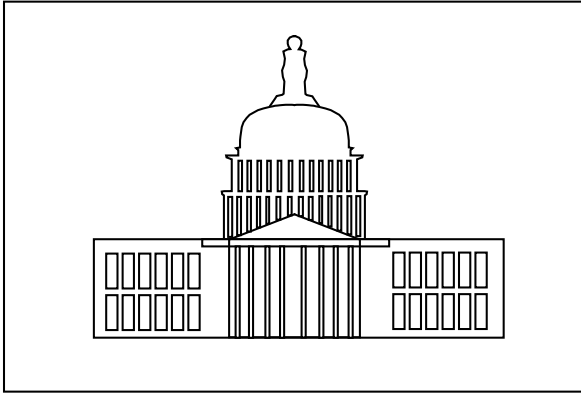
*Exhibit 2-1. Learning Objectives.*

## **CHAPTER INTRODUCTION**

As prescribed by the Constitution, responsibility for the Federal acquisition system is divided among the legislative, the executive, and the judicial branches. The major roles played by the three branches of Government in acquisition are depicted in Exhibit 2-2.

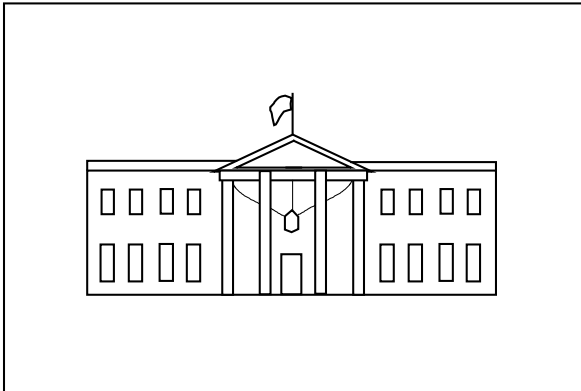
In this chapter, you will learn what those major roles are and the identity of the major Government organizations with acquisition responsibilities. You will also learn about public participation in formulating acquisition policies and procedures.

**MAJOR ROLES OF THE BRANCHES OF GOVERNMENT IN  
THE ACQUISITION PROCESS ROLES**



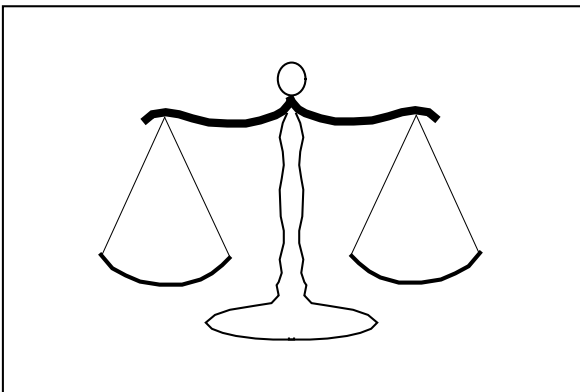
**LEGISLATIVE BRANCH -- CONGRESS**

- **PASSES LAWS**
- **APPROPRIATES MONEY**



**EXECUTIVE BRANCH -- THE PRESIDENT**

- **DEVELOPS PLANS, PROGRAMS, AND BUDGETS**
- **EXECUTES BUDGETS AND IMPLEMENTS PLANS AND PROGRAMS**
- **ISSUES EXECUTIVE ORDERS**



**JUDICIAL BRANCH -- THE COURTS**

- **GIVES MEANING TO LAWS**
- **RENDERS DECISIONS PERTAINING TO THE TERMS OF A CONTRACT**

*Exhibit 2-2. Major Roles of the Branches of Government in the Acquisition Process.*

## 2.1 THE LEGISLATIVE BRANCH

The legislative branch includes not only the United States Senate and the United States House of Representatives, but also such entities as the General Accounting Office.

Major constitutional roles are played by Congress that directly affect acquisition:

### Laws

Congress passes laws (statutes), generally identified as Public Laws (P.L.). Among other things, these laws establish policies and procedures for the Federal acquisition process. Examples of recent legislation that has had a major impact on Federal acquisitions are:

- P.L. 85-536, the Small Business Act, as amended.
- P.L. 98-369, the Competition In Contracting Act (part of the Deficit Reduction Act of 1984).
- P.L. 100-679, the Office of Federal Procurement Policy Act Amendments of 1988.

### Appropriations

Congress exercises considerable influence on acquisition by appropriating funds and placing limits on the uses of those funds. Money may be used only for the purpose for which it was appropriated. Also, money appropriated for acquisition purposes must be obligated by contract awards within the time specified; otherwise, the money will “expire” and cannot be used.

### 2.1.1 The Legislative Process

The legislative process begins when a Member of the Congress introduces a bill in his or her chamber. The Clerk of the chamber numbers the bill (S# or H.R.#), and the Speaker of the House or President of the Senate assigns it to the appropriate committee.

The committee’s chair typically assigns each new bill to a subcommittee. Members on the subcommittee, with assistance from the committee’s professional and clerical staff, first conduct any necessary factfinding on the proposed bill. Among other things, the subcommittee may request a report on the bill from the concerned departments and agencies and from the General Accounting Office. The subcommittee may also hold public hearings on the bill. The subcommittee then usually meets in executive session to “mark-up” the bill and reach a decision on whether to report the bill, as amended in the marking-up session, or to table it.

## ORGANIZATIONAL ROLES AND RESPONSIBILITIES

If the bill is reported to the full committee, the committee then has the choice of reporting the bill to the full chamber—with or without amendments—or of tabling it. If the bill is to be reported favorably to the full chamber, one of the Members writes the committee report which typically describes the purpose and scope of the bill and the reasons for its recommended approval. The report frequently includes a section-by-section analysis of the bill. Other members may file supplemental, minority, or additional views. Committee reports are perhaps the most valuable single element of the law's legislative history, in terms of interpreting the purpose and meaning of the law.

Reported bills are voted upon in the originating Chamber, usually after revision. The passed version then goes to the other chamber, where it is assigned to a committee and the process is repeated. If the second Chamber adopts the bill with substantial or controversial amendments, the bill is assigned to a conference committee made up of members of both Chambers.

When a proposed bill, as submitted or amended, is passed by both Chambers, it is sent to the President for signature. If signed, the bill becomes law. If vetoed, it may or may not become law, depending on whether Congress overrides the veto. Once passed, the bill becomes a public law that may be codified, in whole or in part, in the appropriate sections of the United States Code.

### **2.1.2 The Budget Process**

In appropriating and expending funds, the Federal Government generally operates on a Fiscal Year basis. Presently, the Government's Fiscal Year begins on October 1 and ends on September 30 of the next calendar year.

The Government's budget for any given fiscal year is established and executed in four basic phases:

1. Budget formulation and transmittal to the Congress prior to the fiscal year.
2. Authorization and appropriation of funds by the Congress for the fiscal year.
3. Budget execution during the fiscal year.
4. Review and audit.

## CHAPTER 2

### Budget Formulation

Every January, the President transmits a budget to the Congress for the fiscal year that begins on the following October 1. This transmittal represents months of collaborative factfinding, planning, and analysis by the President, Office of Management and Budget (OMB), other Executive Office units, and Federal agencies.

This factfinding and planning is performed in part by program managers. Among other things, managers forecast the acquisition requirements of their programs and estimate related costs for the fiscal year to come and for a number of out-years thereafter. Such estimates are made long before the managers initiate the corresponding Purchase Requests (PRs) to contracting offices.

Proposed acquisition requirements and cost estimates enter the stream of information, proposals, evaluations, and policy decisions that influence the President's general guidelines for preparing agency budget requests. The President establishes these guidelines in the spring, at least eighteen months before the budget fiscal year begins. For instance, guidelines for the FY1990 budget were prescribed in the spring of 1988. Under the multi-year budget planning system, the budgetary guidelines cover the coming fiscal year and the four fiscal years beyond.

In the summer, agencies prepare their budget requests. At this time, program managers have another opportunity to revise their forecasts of acquisition requirements and bring them into line with the budgetary guidelines. Agency budget requests are reviewed in detail in the fall by the OMB and presented to the President. The President submits an overall budget to the Congress in January.

### Authorization and Appropriations

The Congress begins its formal review of the President's budget proposals when it receives them. The Congress can approve, modify, or disapprove these proposals. It can change funding levels, eliminate programs, or add programs not requested by the President.

Before appropriating funds, the Congress decides whether or not to authorize the program and, if it decides favorably, enacts authorizing legislation. Many programs are authorized for a specified number of years or indefinitely. Other programs require annual authorizing legislation. After authorizing a program in one law, the Congress normally enacts a separate law to appropriate funds to operate the program.

When appropriating funds, the Congress does not vote directly on the level of outlay, but rather on budget authority or authority to incur obligations that will result in immediate or future outlays. Obligations are

## ORGANIZATIONAL ROLES AND RESPONSIBILITIES

legally binding commitments (e.g., contract awards) made by Federal agencies during a given period that will require outlays during the same or some future period. Outlays are checks issued or cash disbursed.

For the majority of Federal programs, budget authority becomes available each year only as voted by the Congress. In other cases, the Congress has voted permanent budget authority, under which funds become available annually without further congressional action.

After passing the Congress, authorization and appropriations measures are transmitted to the President for approval or veto. When appropriations are not enacted by the beginning of the fiscal year, the Congress enacts a “continuing resolution” to provide authority so that the affected agencies may continue operations to a specific date or until their regular appropriations are approved.

### Budget Execution and Control

The Director of OMB apportions appropriated funds to each agency by time periods and by activities. Such funds are then available for obligation during the fiscal year through such means as contract awards.

However, not all of the new budget authority for the fiscal year may be obligated or spent in that year. For example, the budget authority for many major construction and procurement programs covers the estimated full cost of projects at the time they are started. Likewise, budget authority for most long-term contracts covers the estimated maximum obligation of the Government. As a result, a large amount of budget authority carries over from one year to the next. Most is earmarked for specific uses and is therefore not available for other programs.

For Federal Contracting Officers (COs), this complicates the task of reviewing PRs. COs must ensure that funds earmarked for the contract are in fact properly obligated for that acquisition (see Section 6.2.1.2 of this text).

### Review and Audit

Individual agencies are responsible for assuring that the obligations they incur and the resulting outlays are in accordance with laws and regulations. Within most agencies, Inspector Generals audit programs. For the Government as a whole, OMB reviews program and financial reports. In addition, Congressional oversight takes such forms as committee hearings and GAO audits, as described in the next sections.

## CHAPTER 2

### 2.1.3 Committees

The Congress has established a number of standing committees. Many committees create subcommittees to focus on specific issues. Committees and subcommittees are assisted by appointed staff who have various administrative, technical, or legal skills.

Because acquisition (particularly defense) represents such a large portion of the Federal budget, several committees and subcommittees monitor procurement and contracting matters. Some of the more important of these committees are shown in Exhibit 2-3.

CONGRESSIONAL COMMITTEES THAT MONITOR PROCUREMENT AND CONTRACTING MATTERS	
Senate Committees:	
	<ul style="list-style-type: none"><li>• Armed Services.</li><li>• Governmental Affairs.</li><li>• Small Business.</li></ul>
House of Representatives Committees:	
	<ul style="list-style-type: none"><li>• Armed Services.</li><li>• Government Operations.</li><li>• Small Business.</li></ul>

*Exhibit 2-3. Congressional Committees that Monitor Procurement and Contracting Matters.*

### 2.1.4 GAO

In addition to the committee system, Congress created the General Accounting Office (GAO). The GAO is headed by the Comptroller General of the United States. GAO is informally referred to as “the watchdog for the Congress.” GAO performs several functions directly related to the acquisition process.

#### Oversight and Investigations

GAO audits and investigates agency programs and management, focusing on fraud and mismanagement.



Protests

The Comptroller General is authorized to recommend decisions to agency heads on protests that are filed against the Government with the GAO pertaining to the award or non-award of contracts (see Chapter 7). Decisions of the Comptroller General are an important element of procurement-related case law, as they establish precedents and interpretations of policies that have a Governmentwide impact. Contracting officers often research and cite decisions of the Comptroller General on protests when making potentially controversial decisions relative to the solicitation or award of a contract.

## 2.2 THE EXECUTIVE BRANCH

The executive branch, headed by the President of the United States, plays several major roles relative to acquisitions. Among others, these roles include:

- Developing plans, programs, and budgets for consideration by the Congress.
- Executing budgets and implementing the plans and programs authorized by the Congress, including:
  - Determining whether to meet program needs through in-house performance or by contracting.
  - Awarding and administering contracts.
- Supplementing and augmenting statutory acquisition policies and procedures through such means as Executive Orders.
- Developing and maintaining the Federal acquisition regulatory system to implement statutory and executive branch policies and procedures for the Federal acquisition process.

The principal organizations and individuals in the executive branch that play a Governmentwide role in acquisition are described below. (Roles and responsibilities for the acquisition process within agencies are discussed in Chapter 4).

The President

1. Establishes Governmentwide acquisition policies and procedures. For example, some Presidents have issued executive orders on acquisition issues (see Chapter 3, Exhibit 3-3).
2. Makes political and management decisions relative to programs and related budget requests.
3. Appoints agency heads and other officials who have direct or indirect management control over acquisition programs.

## CHAPTER 2

### The Office of Management and Budget (OMB)

1. Recommends programs and funding levels for programs.
2. Monitors programs and, when appropriate, adjusts funding levels.
3. Develops and issues policy guidance on such management concerns as paperwork reduction, grants management, and, through the Office of Federal Procurement Policy, on procurement.
4. Reviews proposed regulations for compliance with policy guidance.

### The Office of Federal Procurement Policy (OFPP)

The OFPP is part of OMB; its Administrator is appointed by the President. OFPP provides leadership and direction to Federal procurement programs. It does so, in part, through OMB Circulars such as Circular A-109, "Major Systems Acquisition" and OMB Circular A-76, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government." To carry out its obligations, OFPP's responsibilities include those listed in Exhibit 2-4.

**OFPP RESPONSIBILITIES**

- Provides overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.
- Prescribes Governmentwide procurement policies for implementation in the FAR.
- Prescribes Governmentwide procurement regulations, procedures and forms, when the FAR Council fails to reach a timely agreement on the regulation for implementing a Governmentwide procurement policy.
- Provides leadership in the establishment, development and maintenance of the FAR.
- Coordinates the development of Governmentwide procurement systems standards.
- Provides leadership and coordination in the formulation of executive branch positions on procurement-related legislation.
- Oversees the collection, development, and dissemination of procurement data through the Federal Procurement Data System.
- Oversees the Federal Acquisition Institute to support the development of a competent, professional procurement workforce.
- Solicits the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms.
- Develops standard contract forms and language.
- Develops innovative procurement methods and procedures to be tested by selected executive agencies.
- Advises the President and the Congress on matters relating to procurement.

*Exhibit 2-4. OFPP Responsibilities.*

**Board of Contract Appeals**

The Contract Disputes Act provides the statutory authority for a Board of Contract Appeals (BCA) to resolve contract disputes between the CO and the contractor. Several of the larger agencies have their own independent BCAs. Agencies that do not have a BCA use the BCA of another agency when needed. Contracting officers often research and cite decisions of the Boards on claims when interpreting and administering contracts.

The General Services Board of Contract Appeals (GSBCA) also has statutory authority to hear protests related to the acquisition of automatic data processing (ADP) equipment or related resources, which may be filed by the interested party either with the GSBCA or the GAO (see Section 2.1.4).

Regulations on protests and disputes are covered in FAR Part 33.

## CHAPTER 2

### The Federal Acquisition Regulatory Council

This council is comprised of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. As provided in § 25 of the Office of Federal Procurement Policy Act, the Council assists “in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.”

### The Attorney General of the United States

The Attorney General represents the executive branch in matters pertaining to the constitutional aspects of acquisition legislation or in the prosecution of acquisition-related fraud.

### Executive Agency Heads

The head of each executive agency carries out Governmentwide acquisition policies, procedures, and regulations. In addition, agency heads, and their designees, establish supplementary acquisition regulations and other internal policies and procedures and are responsible for fulfilling agency acquisitional needs. See Exhibit 2-5 for the definition of “head of the agency” (FAR Part 2).

#### DEFINITION OF HEAD OF AGENCY

“Head of the agency” (also called “agency head”) means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency and, for the Department of Defense, the Under Secretary and any Assistant Secretary of the Departments of the Army, Navy, and Air Force and the Director and Deputy Director of Defense agencies; and the term “authorized representative” means any person, persons, or board (other than the contracting officer) authorized to act for the head of the agency or Secretary.

*Exhibit 2-5. Definition of Head of the Agency, FAR 2.101.*

## 2.3 THE JUDICIAL BRANCH

The judicial branch tries all legal cases that involve the Government. For example, when the contracting officer or cognizant BCA cannot administratively settle a dispute between the Government and one of its contractors under the terms and conditions of the contract, the issue may be taken to court (generally as provided for by the “Disputes” clause of the contract). The court resolves such disputes based on Federal statutes, case law, and the terms and conditions of the contract.

#### ORGANIZATIONAL ROLES AND RESPONSIBILITIES

If the contractor chooses to bypass the BCA and go directly to court, the case is heard by the United States Claims Court. To appeal either a BCA or Court of Claims decision, the appellant (either the contractor or the Government) files with the United States Court of Appeals for the Federal Circuit. Court decisions give meaning to (or serve to interpret):

- Laws passed by the legislative branch, or
- Policies and regulations originated by the executive branch.

In addition to interpreting laws, a court may render decisions pertaining to the terms and conditions of a specific contract. COs often refer to these decisions as they attempt to resolve protests or disputes.

## 2.4 PUBLIC PARTICIPATION

Organizations and individuals in the private (non-Government) sector also play a role in the acquisition process. Participants include:

- Trade associations.
- Professional societies.
- Companies.
- Individuals.

Organizations and individuals can influence Congress to pass or alter legislation. They can also influence how the legislation is implemented. In addition, the public is invited to comment on proposed rule changes, as published in the Federal Register (see Chapter 3). These comments are taken into consideration when the final rule is prepared for publication

## CHAPTER 2

# CHAPTER 3

## BASIC STATUTES AND REGULATIONS

### PART 1

#### FEDERAL ACQUISITION REGULATIONS SYSTEM

##### 1.000 Scope of part.

This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

##### SUBPART 1.1—PURPOSE, AUTHORITY, ISSUANCE

##### 1.101 Purpose.

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

##### 1.102 Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19, 1985.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

##### 1.103 Applicability.

The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded.

##### 1.104 Issuance.

##### 1.104-1 Publication and code arrangement.

(a) The FAR is published in (1) the daily issue of the Federal Register, (2) cumulated form in the Code of Federal Regulations (CFR), and (3) a separate loose-leaf edition.

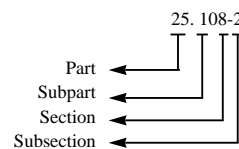
(b) The FAR is issued as Chapter 1 of Title 48, CFR. Subsequent chapters are reserved for agency acquisition regulations that implement or supplement the FAR (see Subpart 1.3). The CFR Staff will assign chapter numbers to requesting agencies.

(c) Each numbered unit or segment (e.g., part, subpart, section, etc.) of an agency acquisition regulation that is codified in the CFR shall begin with the chapter number. However, the chapter number assigned to the FAR will not be included in the numbered units or segments of the FAR.

##### 1.104-2 Arrangement of regulations.

(a) *General.* The FAR is divided into subchapters, parts (each of which deals with a separate aspect of acquisition), subparts, sections, and subsections.

(b) *Numbering.* (1) The numbering system permits the discrete identification of every FAR paragraph. The digits to the left of the decimal point represent the part number. The numbers to the right of the decimal point and to the left of the dash represent, in order, the subpart (one or two digits), and the section (two digits). The number to the right of the dash represents the subsection. Subdivisions may be used at the section and subsection level to identify individual paragraphs. The following example illustrates the make-up of a FAR number citation (note that subchapters are not used with citations):



(2) Subdivisions below the section or subsection level shall consist of parenthetical alphanumeric reading from highest to lowest indenture as follows: lower

1-1

*Exhibit 3-1. Sample Page of the FAR.*

### **Learning Objectives**

- 3-1 Identify and describe the four principal sources of Federal Contract Law.
- 3-2 Identify the basic statutes that control the fundamentals of purchasing and contracting.
- 3-3 Describe the FAR system, including
  - Sources.
  - Maintenance.
  - Supplements.
  - Usage.

*Exhibit 3-2. Learning Objectives.*

## **CHAPTER INTRODUCTION**

At the front of this chapter is a copy of the first page of the Federal Acquisition Regulation (FAR). All personnel involved in procurement are required to follow those regulations. This chapter focuses on the Federal Acquisition Regulatory System and how it is used.

The Government's ability to procure supplies and services rests upon law and is limited by law. There are literally hundreds of statutes and thousands of pages of regulations that control or affect the process. No one course can effectively cover all of that material and no one person knows or is capable of knowing all of the statutes and regulations. In fact, no one segment of acquisition (construction, ADP, supplies, etc.) uses or is affected by them all.

These laws are necessary in part because of the unique status of the Government. The Government is a sovereign body, or body supreme. As such, it has special powers and immunities. These give it certain advantages in the making of contracts but also impose unique limitations on its contractual authority.

This chapter presents the:

- Sources of Federal Contract Law.
- Basic statutes.
- The Federal Acquisition Regulatory System.



### 3.1 THE SOURCES OF FEDERAL CONTRACT LAW

There are four sources of Federal contract law:

- The Constitution.
- Statutes.
- Administrative Law.
- Common Law.

#### 3.1.1 The Constitution

The Constitution of the United States is the supreme law of the land. It does not, however, specifically address whether the Government has the right to enter into contracts. It was not until 1831 that the Supreme Court, in a “landmark” decision (United States versus Tingey), declared that the Federal Government has:

- **Inherent power**, based on sovereignty, to enter into contracts, and
- **Implied powers**, as necessary to the proper performance of its duties.

The Court also stated guidelines to apply to determine the **validity** of a Government contract:

- Is the Government authorized to act?
- Is the act performed by someone having the authority to act?

Both of these must be answered in the affirmative and both apply today.

#### 3.1.2 Statutes

A statute is a law enacted by the legislative branch of Government and signed by the President. The statute is identified by its public law number. For example, Public Law 93-400 is the Office of Federal Procurement Policy Act (OFPP), enacted in 1974. The various sections of a public law are later included in the appropriate U.S. Code or Codes. Part of the P.L. 93-420 has been “codified” at 41 U.S.C. 401 (see Chapter 1). The OFPP Act has been amended by several laws, most notably by the “Office of Federal Procurement Policy Act Amendments of 1983” (P.L. 98-191) and by the “Office of Federal Procurement Policy Act Amendments of 1988” (P.L. 100-679).

Section 3.2 summarizes the legislative history of statutes that govern the Federal acquisition system and identifies some of the most important statutes.

### **3.1.3 Administrative Law**

Administrative law provides the third basic source of Federal Contract Law. Sources of administrative law include:

- Executive Orders signed by the President.
- Rules and regulations.
- Decisions by the Comptroller General and administrative law judges.

#### **Executive Orders**

Executive Orders (E.O.) establish policies to be followed by the executive agencies. E.O.'s stay in effect unless rescinded by the signing President or a successor President. Few E.O.'s have been issued that directly affect procurement. Exhibit 3-3 lists some of the most important of such EO's.

<b>KEY EXECUTIVE ORDERS</b>	
<b>E.O. 10582</b>	<p>“Prescribing Uniform Procedures for Certain Determinations under the Buy-American Act”, December 17, 1954 (as amended).</p> <p>Establishes Governmentwide rules for determining when, under the “Buy-American” Act, Federal departments and agencies may purchase materials of foreign origin for public use within the U.S.</p>
<b>E.O. 11246</b>	<p>“Equal Employment Opportunity”, September 24, 1962 (as amended).</p> <p>Requires contractors to agree not to discriminate on the basis of race, color, religion, sex, or national origin in their employment practices.</p>
<b>E.O. 11141</b>	<p>“Declaring a Public Policy Against Discrimination on the Basis of Age”, February 12, 1964.</p> <p>As a matter of public policy, precludes contractors and subcontractors engaged in the performance of public contracts from discriminating on the basis of age in their employment practices.</p>
<b>E.O. 11701</b>	<p>“Employment of Veterans by Federal Agencies and Government Contractors and Subcontractors”, January 24, 1973.</p> <p>Provides direction to the Department of Labor and the heads of executive agencies with respect to the employment of veterans.</p>
<b>E.O. 11738</b>	<p>“Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal Contracts, Grants, or Loans,” September 10, 1973.</p> <p>Prohibits contracting for goods, materials, or services which would be performed in whole or in part in a facility that has been designed by EPA as being in violation of environmental laws.</p>
<b>E.O. 12073</b>	<p>“Federal Procurement In Labor Surplus Areas”, August 16, 1978.</p> <p>Requires executive agencies to encourage procurement set-asides in labor surplus areas and assigns responsibilities for accomplishing this purpose.</p>

*Exhibit 3-3. Key Executive Orders.*

<b>KEY EXECUTIVE ORDERS (CONTINUED)</b>	
<b>E.O. 12138</b>	<p>“Creating a National Women’s Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating, and Implementing a National Program for Women’s Business Enterprise,” May 18, 1979.</p> <p>Among other things, encourages the awarding of subcontracts under Federal prime contracts to women-owned enterprises.</p>
<b>E.O. 12352</b>	<p>“Federal Procurement Reforms”, March 17, 1982.</p> <ol style="list-style-type: none"> <li>1. Directs the head of each executive agency to designate a Procurement Executive with agency-wide responsibility to: <ul style="list-style-type: none"> <li>• Oversee the development of procurement systems.</li> <li>• Evaluate system performance in accordance with approved criteria.</li> <li>• Enhance career management of the workforce, and</li> <li>• Certify to the agency head that procurement systems meet approved criteria.</li> </ul> </li> <li>2. Directs agency heads to take a number of other measures to make procurement more effective in support of mission accomplishment, including the establishment of procurement system criteria and career management programs.</li> <li>3. Directs the Office of Management and Budget to identify desirable Government-wide procurement system criteria, review agency implementation of the EO, and perform other such functions.</li> </ol>
<b>E.O. 12448</b>	<p>“Exercise of Authority Under Section 218 of Title 18, United States Code”, November 4, 1983.</p> <p>Authorizes Federal agencies to promulgate regulations for voiding or rescinding contracts obtained through bribery, graft or conflict of interest.</p>

*Exhibit 3-3. Key Executive Orders (Continued).*

Rules and Regulations      Agency heads are empowered by statute or by Presidential order to prepare and issue **rules and regulations**. The Government is required under the Administrative Procedures Act to publish most, but not all, such rules and regulations in both of the following publications.

The Federal Register      The FR is a daily Government publication. It provides a uniform system for making regulations and legal notices issued by Federal agencies available to the public. Proposed rules are published so that the public can comment on them. After comments are received and evaluated, final rules are published. Some rules are based on statute and some on policies flowing from OMB, OFPP, the agencies, etc.

The Code of Federal Regulations (CFR)      The CFR is a catalog or codification of the rules (published in the Federal Register) concerning the executive departments and agencies of the Federal Government. The CFR is organized as indicated below:

- The CFR is divided into 50 **titles**. Each title represents broad areas subject to regulation by the Federal Government.
- Each title is divided into **chapters**. Each chapter usually bears the name of the issuing agency and is further subdivided into parts covering specific regulatory areas.

A number of rules and regulations apply to the Federal acquisition process and have Governmentwide force and effect. These are summarized in Exhibit 3-4.

<b>RULES AND REGULATIONS THAT APPLY TO FEDERAL PROCUREMENTS</b>		
<i>Title</i>	<i>CFR §</i>	<i>Coverage</i>
Office of Federal Procurement Policy (OFPP) Policy Letters	N/A	Establish Governmentwide policies for acquiring supplies and services.
The Federal Acquisition Regulation (FAR)	48 CFR Ch. 1	Establish Governmentwide rules and regulations that apply generally to the acquisition of supplies and services (see section 3.3 of this chapter).
FAR Supplements	48 CFR Chs. 2-53	Establish rules and regulations that apply generally to the acquisition of supplies and services within the issuing Federal department or agency.
Supply and Procurement (from the FPMR—Federal Property Management Regulations)	41 CFR Ch. 101 Subch. E (§101-25 through 101-33)	Prescribes additional Governmentwide rules for: <ul style="list-style-type: none"> <li>• Determining the method of supply.</li> <li>• Interagency purchases.</li> <li>• Purchase vs. lease determinations.</li> <li>• Acquiring supplies and services from GSA and other interagency supply sources.</li> <li>• Inventory management.</li> <li>• Storage and distribution.</li> <li>• Federal product descriptions (e.g., Federal Specifications, CIDs, etc.).</li> <li>• Inspection and quality control.</li> <li>• Acquisition of public utilities.</li> </ul>
Labor	29 CFR 41 CFR ch. 50	Establishes rules for socioeconomic objectives and related programs under its cognizance, such as the Fair Labor Standards Act.
Small Business Administration (SBA)	13 CFR	Establishes rules for socioeconomic objectives and related programs under its cognizance, such as the small business set-aside program.

*Exhibit 3-4. Key Regulations.*

<b>RULES AND REGULATIONS THAT APPLY TO FEDERAL PROCUREMENTS (CONTINUED)</b>		
<i>Title</i>	<i>CFR §</i>	<i>Coverage</i>
Federal Information Resources Management Regulation	41 CFR Ch. 201	Prescribes special rules for the acquisition of automated data processing and telecommunications software and hardware.
Rules of the GSA Board of Contract Appeals	48 CFR Ch. 61	Parts 6100-6199, among other things, establish the rules for the filing and hearing of protests of ADP awards.
Acquisition of Real Property (from the FPMR)	41 CFR Ch. 101 § 101-18	Prescribes special rules for the acquisition of real property.

*Exhibit 3-4. Key Regulations (Continued).*

#### Administrative Law Decisions

Under several statutes (most notably the Disputes Act and the Competition in Contracting Act), administrative forums have been established to hear and decide claims, protests, and other questions involving the interpretation of contracts and Federal laws, rules, and regulations that apply to contracts. Among others, these include Boards of Contract Appeals and the General Accounting Office.

#### Boards of Contract Appeals (BCAs)

BCAs render decisions on disputes arising under contracts. If there is a disagreement between a contractor and an agency as to a contractual requirement or the meaning of a contract, the contractor will ask the CO for a final decision. If the contractor is not satisfied by the decision, an appeal is filed by the contractor with the appropriate BCA under the “Disputes” clause of the contract. In addition to disputes, the General Services BCA renders decisions on protests involving procurement actions relative to certain aspects of ADPE.

#### The Comptroller General (Comp. Gen.)

The Comptroller General of the General Accounting Office prepares recommendations on protests for consideration by the agency. These recommendations are published as “Comptroller General Decisions.” The Comptroller General's recommendations on protests often function as “precedents” for interpreting statutes and other types of law.

### **3.1.4 Common Law**

The final source of Federal Contract Law includes decisions handed down by judges in courts of law and the application of “common” law. Today, the courts are a more important source of contract law in the private sector than in the Federal sector. This is because the Disputes Act and other such laws have established administrative procedures and forums for deciding protests of Federal contract award and claims arising under or related to a Federal contract. However, when the courts agree to hear a case and decide that the case involves issues within their jurisdiction, the courts nonetheless can override administrative law judges or the Comptroller General and establish binding precedents.

## **3.2 BASIC STATUTES**

This section conveys a brief history of Federal acquisition, an overview of the statutes that presently control procurement and contracting, and reviews of the more critical statutes.

### **3.2.1 Legislative History of Federal Acquisition**

Writers and lecturers sometimes refer to an “early contract” to illustrate what contracting was like in the “old days.” They will refer to a two page Government contract between the Army and the Wright brothers to develop an airplane for military use. Similarly, an early example of contract administration requirements is reflected in a letter “dispatching” a Navy captain to Philadelphia to make sure the company building a naval vessel “accomplished the work in good order.” You will see in a later chapter that contract administration is now much more complex.

The evolution from simple, short contracts and contracting procedures to the complex, lengthy contracts and processes encountered today began with World War II. This war was a milestone event that brought about significant changes in the Federal Acquisition Process.

#### **Pre-World War II**

From the late 1700s until the 1940s, the Department of the Treasury was responsible for the procurement of supplies and services for the U.S. Government. In addition, the Department of War and the Department of the Navy were authorized to contract for goods and services for military use.



## BASIC STATUTES AND REGULATIONS

In the early years of our Government, there were few controls on contracting, and favoritism soon became a problem. In 1809, Congress established the requirement for competition in Government procurement. Congress enacted legislation that required all purchases and contracts for supplies and services to be made by either:

- Open purchasing.
- Advertising for offers.

Exhibit 3-5 defines these terms.

The 1809 legislation was the first attempt to avoid favoritism by requiring competition. However, more controls would be needed. In subsequent years, the Federal Government repeatedly faced procurement scandals brought about by undisclosed purchases made at inflated prices. In fact, it was found that some members of Congress had benefited by obtaining Government contracts for their friends.

TERMS USED TO DESCRIBE COMPETITION	
Open Purchasing	<ul style="list-style-type: none"><li>• Going to the open market.</li><li>• Buying from merchants at the established or prevailing market price.</li></ul>
Advertising for Offers	<ul style="list-style-type: none"><li>• Publicly advertising a Government requirement.</li><li>• Requesting interested parties to respond by submitting bids.</li></ul>

*Exhibit 3-5. Terms Used to Describe Competition.*

Congress responded by passing the Civil Sundry and Appropriations Act of 1861, which, as amended, is referred to as Revised Statute (R.S.) 3709: This was the primary law controlling Government contracting until the 1940s. This act required:

- Open solicitation of sealed bids.
- Public opening of bids received.
- Contract award to be made to the low bidder.

## CHAPTER 3

The three-part process became known as “formal advertising” and was referred to by that name until 1985, when the Competition in Contracting Act (CICA) formally renamed it “sealed bidding.”

R.S. 3709 did provide the following exceptions to the above requirements:

- Personal services.
- Public exigencies (urgencies).
- Small purchases.

There were few changes to Government contracting regulation for a number of years. Then, in the early 1900s (particularly the 1930s), socioeconomic laws, including the Buy American Act, and several laws that are beneficial to labor, were added to contracting regulations.

### World War II

In 1941, Congress enacted the first War Powers Act. Where necessary to facilitate prosecution of the war, the Act permitted the President to authorize certain departments and agencies to make procurements with no contract law requirements concerning the making, performing, amending or modifying contracts (e.g., without regard to requirements for formal advertising). Thus, the procurement of supplies, material, and equipment for the defense effort approximated the freedom to bargain, a custom enjoyed in the private sector.

While procurement in time of war initiated the use of the most expedient purchase methods, World War II also brought about an era of technological advancements. This meant, for example, moving away from “inventory replenishment” and toward the introduction of new equipment and new supplies. Formal advertising procedures were not appropriate for these such procurements.

### Post World War II

At the end of the war, it was apparent that agencies concerned with wartime procurement demonstrated the ability to use judgment, discretion, and sound business sense under the broad procurement powers granted them during the war. In keeping with this development, legislation was proposed in Congress to authorize negotiated procurements on an “exception” basis. Some of the exceptions that permitted negotiations were:

- National emergency.
- Public exigency (urgency).
- Experimental, developmental, and research work.
- Food (perishable or nonperishable subsistence supplies).

## BASIC STATUTES AND REGULATIONS

Concurrently, the size and scope of procurement had radically changed. The armed services, even post-war, were spending many times more dollars than were spent by all of Government in pre-war years. Therefore, for the first time, Congress decided to pass comprehensive procurement legislation that would provide for contracting by negotiation.

In 1947, the Armed Services Procurement Act (ASPA) (Title 10 of the U.S. Code, starting at Section 2301) established authority for the Department of Defense to:

- Contract for the acquisition of property and services needed for the national defense.
- Write regulations to implement this act.

The DoD implemented the Act by issuing the “Armed Services Procurement Regulation” (ASPR), subsequently renamed the “Defense Acquisition Regulation” (DAR). The DAR and associated regulations favored contracting by formal advertising, but permitted Contracting Officers in Defense agencies to negotiate contracts under one or more of 17 exceptions to the requirement for formal advertising.

Both the Congress and the executive branches quickly recognized that procurement was also a “growing business” for the civilian agencies. In 1949, Congress enacted the Federal Property and Administrative Services Act (FPASA), codified primarily in Title 41 (some in Title 40) of the U.S. Code. FPASA established the General Services Administration, instead of the Department of the Treasury, as the agency primarily responsible for acquisition, supply, and construction, and for disposal of materials and equipment for civilian agencies. The FPASA allowed Contracting Officers in civilian agencies to negotiate contracts if any one of 15 exceptions applied to the acquisition. Pursuant to the FPASA, GSA prepared and issued the Federal Procurement Regulation (FPR), which applied to civilian agencies.

Although some socioeconomic regulations became effective in the 1900s, none had a significant impact on contracting procedures. However, in 1950, the Small Business Act was passed. In 1978, Public Law 95-507 made extensive changes to the Small Business Act. Since then, numerous statutes have included changes to the Act.

The Office of Federal Procurement Policy (OFPP) Act was passed in 1974. This Act created OFPP and made it a part of the Office of Management and Budget. There have been several amendments to the

Act which have strengthened its role as the central organization in the executive branch for acquisition and procurement and public affairs. These were noted in Chapter 2.

### 3.2.2 Basic Statutes

The following four statutes govern the Federal acquisition process. They are listed here with references to locations in the United States Code (U.S.C.) in which their provisions have predominantly been codified.

<b>Act</b>	<b>Acquisition-Related Provisions</b>
Armed Services Procurement Act	10 U.S.C. §2301 et. seq.
Federal Property and Administrative Services Act	41 U.S.C. §201 et. seq.
Office of Federal Procurement Policy Act	41 U.S.C. §401 et. seq.
Small Business Act	15 U.S.C. §631 et. seq.

These statutes are frequently amended. Normally, you will not deal directly with the language of these statutes but rather with the FAR provisions that implement them.

In addition to the four statutes mentioned above, there are nearly 500 other statutes that apply to one or more aspects of Federal procurement. Exhibit 3-6 summarizes some of the better known of these statutes. Except where noted, the names of these acts are taken from title 50, United States Code, “Acts Cited By Popular Name.” In that table, you will find both the name of the act and the identity of sections in the United States Code in which the act’s provisions have been codified.

<b>ACQUISITION-RELATED STATUTES</b>	
<i>Statute</i>	<i>Among Its Purposes:</i>
An Act Concerning Public Contracts (1808, 2 Stat. 484)*	Prohibits members of Congress from benefiting from Government contracts.
Anti-Deficiency Act (1906)	Prohibits commitments unless funding is available. Provides for personal liability.
Anti-Kickback Act (1934)	Prohibits “pay-offs” to get a Government contract.
Assignment of Claims Act (1940)	Provides a basis for contractors to obtain loans from private sector lenders against future contract payments, with authorization for the Government to make such payments directly to the lending institution.
Authorization and Appropriations Acts (various)*	Often serve as a vehicle for amending basic procurement statutes to prescribe new or amended policies and procedures. For example, an appropriations act in 1861 (12 Stat. 220) forbids the making of a contract unless authorized by law or under an appropriation adequate to its fulfillment. An appropriations act in 1868 (15 Stat. 177) states that no contract may bind the Government to pay an amount in excess of that appropriated. These requirements are still in force today and have been codified as sections 11 and 12 of title 41, United States Code.
Buy American Act (1933)	Provides preference for domestic over foreign materials when acquiring supplies for the Government.
Cargo Preference Act (1954)	Requires shipment of all military and at least half of other goods in U.S. vessels.
Clean Air Act Amendments (1970)	Prohibits contracting with a company convicted of criminal violation of air pollution standards.

*Exhibit 3-6. Acquisition-Related Statutes.*

\* Titles that do not appear in Title 50, United States Code, among the "Acts Cited By Popular Name."

<b>ACQUISITION-RELATED STATUTES</b>	
<i>Statute</i>	<i>Among Its Purposes:</i>
Competition in Contracting Act (1984)	<ul style="list-style-type: none"> <li>• Makes “full and open” competition an underlying objective in procurement.</li> <li>• Establishes Competition Advocates at high, responsible levels in every agency, with authority, in some instances, to disapprove proposed procurements that would not achieve “full and open competition.”</li> <li>• Imposes strict limits on the use of “sole source” procurements.</li> </ul>
Contract Disputes Act (1978)	Establishes a procedure and forums for resolving claims arising under or related to a contract.
Crimes and Criminal Procedure Act (1948)	Requires mandatory purchase of specific supplies from Federal Prison Industries, Inc.
Davis-Bacon Act (1931)	Prescribes minimum wages, benefits, and working conditions on construction contracts.
Defense Production Act (1970)	Established a Cost Accounting Standards Board and authorized the promulgation of cost accounting standards that apply to certain Federal contracts and contractors. Authority for the Cost Accounting Standards Board now rests in the OFPP Act, as amended (P.L. 100-679).
Freedom of Information Act (1966)	Provides for making certain information on Government activities, including acquisition-related activities, available to the public.
Miller Act (1935)	Requires contractors to provide payment and performance bonds on Government construction contracts.
Patents Act (1980)	Defines patent rights with respect to inventions made with Federal assistance, in terms of the conditions under which a small business or non-profit entity may elect to retain title to the invention and limits on that right (e.g., royalty free use of the invention by the Government and “march-in” rights).
Program Fraud Civil Remedies Act (1986)	Strengthens ability of Government to prosecute contract-related fraud.

*Exhibit 3-6. Acquisition-Related Statutes (Continued).*

<b>ACQUISITION-RELATED STATUTES</b>	
<i>Statute</i>	<i>Among Its Purposes:</i>
Prompt Payment Act (1982)	Assists contractors, especially small businesses, in obtaining timely payment for contract work.
Service Contract Act (1965)	For covered service contracts over \$2,500, mandates clauses on minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent Federal employee classifications and wage rates.
Trade Agreements Act (1979)	Waiver of the Buy American Act for certain supply contracts.
Truth in Negotiations Act (1962)	Requires offerors or contractors to submit accurate, complete, and current cost or pricing data and to certify the data.
Tucker Act (Claims) (1887)	Provides authority for the claims court to render judgements on claims against the United States.
Wagner-O'Day Act (1938)	Requires purchase of products made by blind and other handicapped persons.
Walsh-Healy Public Contracts Act (1936)	Prescribe minimum wage, hours, age, and working conditions for supply contracts.
Work Hours and Safety Act (1962)	Prescribe minimum wage, hours, age, and working conditions for laborers and mechanics.

*Exhibit 3-6. Acquisition-Related Statutes (Continued).*

Exhibit 3-7 summarizes the history of acquisition statutes and regulations.

<b>MILESTONES IN THE DEVELOPMENT OF FEDERAL ACQUISITION POLICIES</b>	
1700s - 1940s	Department of Treasury is responsible for procurement and acquisition.
1809	Congress requires competition.
1861	Congress requires formal advertising (sealed bidding).
1941	War Powers Act permits purchasing without restraint.
1947	DoD authorized to procure property and services for national defense.
1949	GSA given responsibility for civilian acquisition (GSA established).
1950	Small Business Act.
1974	Office of Federal Procurement Policy (OFPP) established as part of OMB to provide leadership and direction to Federal procurement programs.
1985	Competition in Contracting Act (CICA) makes "full and open" competition the principal objective in Government procurement.

*Exhibit 3-7. Milestones in the Development of Federal Acquisition Policies.*

### **3.2.3 Small Business Act**

As noted in Chapter 1 of this text, there are many statutes that implement social and economic requirements and goals. Government contracts and, in many cases, subcontracts, are used to carry them out. Some of the statutes require the CO to take specific actions (e.g., the Small Business Act) while others have a direct effect on the contractor only (e.g., the Clean Air Act).



## BASIC STATUTES AND REGULATIONS

The Small Business Act, as amended, is generally considered to be the most “active” socioeconomic statute because it requires both parties to take specific action; i.e., the Government in the award of contracts, and the prime contractor in the award of subcontracts.

Under the Act, the Government is required to:

Under the Act, the Government is required to:

1. Establish, within each agency, an Office of Small and Disadvantaged Business Utilization
2. Afford small business concerns an equitable opportunity to compete for contracts (when appropriate or practicable) by :
  - Dividing proposed acquisitions into reasonably small lots to permit offers on quantities less than the total requirement.
  - Planning acquisitions so that more than one small business concern may perform the work within the surety amounts guaranteed by the Small Business Administration (SBA).
  - Establishing reasonable delivery schedules so that small business concerns will be encouraged to compete.
  - Encouraging prime contractors to subcontract with small business concerns.
  - Permitting SBA to assign procurement center representatives to contracting activities or contract administration offices to carry out SBA policies and procedures.
  - Reserving small purchases (those not in excess of \$25,000) for participation by small business concerns.
  - Setting selected acquisitions aside (totally or partially) for exclusive competition among small business concerns.
  - Referring a CO’s determination of a contractor’s nonresponsibility to the SBA for a decision if the firm found to be nonresponsible is a small business concern.
  - Establishing dollar goals for awarding contracts to small and small disadvantaged business concerns.
  - Requiring, at certain dollar thresholds, the offeror in line for the award of a prime contract to develop plans for placing subcontracts with small and small disadvantaged business concerns.
  - Awarding contracts to small, minority-owned, business concerns (known as “8(a)” contractors because the requirement is in Section 8(a) of the Small Business Act).

## CHAPTER 3

Under the Act, contractors are required to:

1. Comply with any requirements in the contract for considering small business concerns (especially those concerns that are women-owned or disadvantaged) in awarding subcontracts (see FAR clauses 52.219-8 and 52.219-13).
2. Implement the subcontracting plan (when required) it submitted when competing for the contract (see FAR clause 52.219-9).

### 3.3 THE FEDERAL ACQUISITION REGULATION SYSTEM

The Federal Acquisition Regulation System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The system consists of the:

- Federal Acquisition Regulation (FAR).
- Agency acquisition regulations that implement or supplement the FAR.

The FAR System does not include internal agency guidance that an agency head is authorized to issue. This type of guidance generally includes:

- Delegations of authority.
- Assignments of responsibility.
- Work-flow procedures.
- Internal reporting requirements.

Be aware that internal agency guidance must not conflict with the FAR.

#### 3.3.1 Sources of the FAR

The FAR was created to provide a single, uniform acquisition regulation to all executive agencies. It became effective on April 1, 1984. Basically, the FAR was the result of a merger of the two major procurement regulations: the Defense Acquisition Regulation and the Federal Procurement Regulation, see Exhibit 3-8.

In addition, the FAR incorporated some of the material contained in NASA procurement regulations and the procurement regulations of other executive agencies.

The material in the FAR, therefore, is based on:

- Statutes.
- Executive Orders (EOs).
- OMB Circulars.
- OFPP Policy Letters.
- Previously existing regulations (especially the DAR and FPR).
- Decisions by the Comptroller General (head of the General Accounting Office), decisions by Boards of Contract Appeals (BCA), the Courts, and case and common law.

<b>THE TWO MAJOR PROCUREMENT REGULATIONS SUPERSEDED BY THE FAR</b>	
The Defense Acquisition Regulation (DAR)	<ul style="list-style-type: none"> <li>• Issued by the Department of Defense (DoD) under 10 U.S.C (U.S. Code, Title 10).</li> <li>• Applicable to all components of the DoD.</li> <li>• Served as the basis for the present Department of Defense FAR Supplement.</li> </ul>
The Federal Procurement Regulation (FPR)	<ul style="list-style-type: none"> <li>• Issued by the General Services Administration (GSA) under 41 U.S.C (U.S. Code, Title 41).</li> <li>• Applicable to all civilian agencies of the executive departments.</li> <li>• Superseded by the FAR in its entirety.</li> </ul>

*Exhibit 3-8. The Two Major Procurement Regulations Superseded By the FAR.*

### 3.3.2 FAR Maintenance

The FAR is maintained by two separate groups or councils under the overall leadership of the Federal Acquisition Regulatory Council, see Exhibit 3-9.

<b>THE TWO COUNCILS RESPONSIBLE FOR MAINTAINING THE FAR</b>	
The Defense Acquisition Regulatory Council (DARC)	The DARC is chaired by a representative of the DoD and has members representing the Army, Navy, Air Force, Defense Logistics Agency, and NASA.
The Civilian Agency Acquisition Council (CAAC)	The CAAC is chaired by a representative of the GSA and has representatives from 12 civilian agencies, as indicated in FAR 1.201.

*Exhibit 3-9. The Two Councils Responsible for Maintaining the FAR.*

The two councils listed in Exhibit 3-9 are responsible for maintaining the FAR. Each council is assigned primary responsibility for prescribed parts and subparts of the FAR. When one council develops a proposed amendment to the FAR, the amendment is referred to the other council for review and concurrence.

The FAR Secretariat, which was established within GSA, provides administrative support. The Secretariat prints, publishes, and distributes the FAR. The Secretariat also provides the two councils with centralized services for:

- Issuing Federal Register notices of proposed and final FAR rules.
- Preparing and issuing Federal Acquisition Circulars, which contain replacements for amended FAR pages.
- Maintaining a synopsis of current FAR revisions and their status.
- Assigning FAR case numbers.
- Maintaining official files.
- Providing miscellaneous administrative support.

FAR cases are numbered consecutively, with the appropriate calendar year (CY) as a prefix. For example: The first case initiated in CY 1990 is Case 90-01.

When a FAR case has been completed and a proposed change approved for publication, the change is issued as a Federal Acquisition Circular

(FAC). Note that there is not a one-to-one correlation between FAR cases and FACs. Some FAR cases are never incorporated in FACs. Several cases may be combined in a single FAC.

FACs are numbered consecutively as issued and are keyed to the fiscal year edition of the FAR. When the original (1984) edition of the FAR was in use, the FACs were numbered 84-XX (e.g., FAC 84-49). The FACs issued under the second (1990) edition of the FAR likewise are numbered 90-XX (e.g., FAC 90-1).

Prior to issuance, the FACs are reviewed by the Administrator of the Office of Federal Procurement Policy and are jointly “signed” by the Secretary of Defense and the Administrators of GSA and NASA or their delegates.

FACs are distributed for insertion into the loose-leaf edition of the FAR. In addition, a bound version of the FAR, which is published in the Code of Federal Regulations format at least once each calendar year, incorporates all circulars to that time.

### **3.3.3 FAR Supplements**

The FAR is the basic regulation. It is essentially a statement of policy, but also includes some procedural detail. The FAR permits agencies to issue supplementing regulations because agencies are organized differently and may have unique acquisition needs. But an agency’s supplemental regulations should not:

- Unnecessarily repeat, paraphrase, or otherwise restate FAR material.
- Conflict with or be inconsistent with the FAR (except as required by law or when a deviation is authorized).

Agency acquisition regulations shall be limited to:

- Those necessary to implement FAR policies and procedures within the agency.
- Additional policies, procedures, solicitation provisions, or contract clauses that supplement the FAR to satisfy the specific needs of the agency.

### 3.3.4 Using the FAR System

When making procurement decisions, you must heed all of the following:

- The FAR.
- Your agency's supplement to the FAR.
- Internal guidance.

#### Using the FAR

The FAR System is in Title 48, Code of Federal Regulations (CFR). The FAR is assigned Chapter 1. Chapter 1 is divided into subchapters and parts as shown in Exhibit 3-8, and is printed in two volumes.

The subchapters shown in Exhibit 3-10 provide organization to the FAR. For practical use, you should be aware that each FAR part is divided as illustrated in Exhibit 3-11.

By using the Table of Contents in Chapter 1 of the FAR, you can locate the subject you are interested in. For example, suppose you are interested in knowing the FAR requirements for competition. The Chapter 1 Table of Contents shows that Part 6 is titled "Competition Requirements." When you locate Part 6, you will find a table of contents for that Part. There you will find that Part 6 is divided into five subparts, which are divided into sections and subsections.

With practice, you will find that locating specific subject matter is relatively easy. You may also use the index in the FAR to help you locate subject matter; however, the internal relationships that exist between the various parts necessitate the frequent use of cross-references. The arrangement of FAR material is described in detail in Subsection 1.104-2 (i.e., Part 1, Subpart 1, Section 4, Subsection 2).

<b>FAR ORGANIZATION</b>	
Parts 1 - 4	Subchapter A — General
Parts 5 - 12	Subchapter B — Competition and Acquisition Planning
Parts 13 - 18	Subchapter C — Contracting Methods and Contract Types
Parts 19 - 26	Subchapter D — Socioeconomic Programs
Parts 27 - 33	Subchapter E — General Contracting Requirements
Parts 34 - 41	Subchapter F — Special Categories of Contracting
Parts 42 - 51	Subchapter G — Contract Management
Parts 52 - 53	Subchapter H — Clauses and Forms
Parts 54 - 99	Reserved

*Exhibit 3-10. FAR Organization.*

<b>EXAMPLE OF HOW THE FAR IS DIVIDED</b>		
<b><u>FAR DIVISIONS</u></b>	<b><u>FAR #</u></b>	<b><u>EXAMPLE</u></b>
Parts	<b><u>14</u></b>	Sealed Bidding
Subparts	14. <b><u>1</u></b>	Use of Sealed Bidding
Sections	14.1 <b><u>03</u></b>	Policy
Subsections	14.103- <b><u>1</u></b>	General

*Exhibit 3-11. Example of How FAR is Divided.*

## CHAPTER 3

### Using Agency Regulations

Chapters 2 through 59 of Title 48 of the CFR are reserved for the acquisition regulations of the executive agencies. Some examples are:

- DoD — Chapter 2.
- HHS — Chapter 3.
- GSA — Chapter 5.
- NASA — Chapter 18.

Using the GSA as an example, GSAR (General Services Administration Acquisition Regulation) supplements to the FAR are preceded by a 5. For example, FAR 6.304(a)(1) requires approval at a level above the CO. It is up to GSA to identify that level. In the GSAR, the coverage is at 506.304.

If an agency needs to supplement the FAR, and there is no counterpart in the FAR, the agency will identify such material by the numbers “70” and up. For example, if the GSAR added something unique to FAR Subpart 6.3, it would be numbered in the GSAR as 506.370 (the second addition at the location would be 506.371). A whole subpart added to FAR Part 6 would be numbered 506.70.



# **CHAPTER 4**

## **ACQUISITION ROLES AND RESPONSIBILITIES WITHIN AN AGENCY (THE PLAYERS)**

### ***An Agency's Organization***

*Jane Doggett, a contract specialist, has just transferred to the Department of Transportation (DOT) from another Federal agency. Jane made the job change because she was promised that, after a reasonable break-in period, she would receive a contracting officer appointment and a promotion in grade.*

*After the usual processing through the Office of Personnel, Jane was assigned to the Federal Railroad Administration (FRA), Office of Procurement Services. Jane knew that the Coast Guard and the Federal Aviation Administration were part of DOT, but she had never heard of the FRA, nor did she know where it fit into the agency.*

*Wanting to impress her superiors, Jane determined that she needed to review the lines of procurement authority within DOT and the sources of policy and procedural direction. She wondered where she might find the necessary information.*

### **Learning Objectives**

- 4-1 Describe various approaches to organizing the acquisition function within a department or agency.
- 4-2 Define the “Law of Agency”.
- 4-3 Identify and define the roles and responsibilities of:
  - Contracting officers (COs).
  - Other contracting personnel.
  - Program/requirements managers.
  - Contracting officer representatives and technical representatives.
  - Quality assurance personnel.
  - Logistics transportation, and supply managers.
  - Property managers.
  - Auditors and accountants.
  - Legal counsel.
  - Small business advocates.
  - Competition and breakout advocates.
  - Other interested parties.

*Exhibit 4-1. Learning Objectives.*

## **CHAPTER INTRODUCTION**

Every executive agency has a specific mission. The agency head establishes broad policies, organizes the agency to meet mission objectives, and delegates authority for those objectives. Acquisition roles and responsibilities within an agency are a function of the agency’s mission, policies, organization, and delegations of authority.

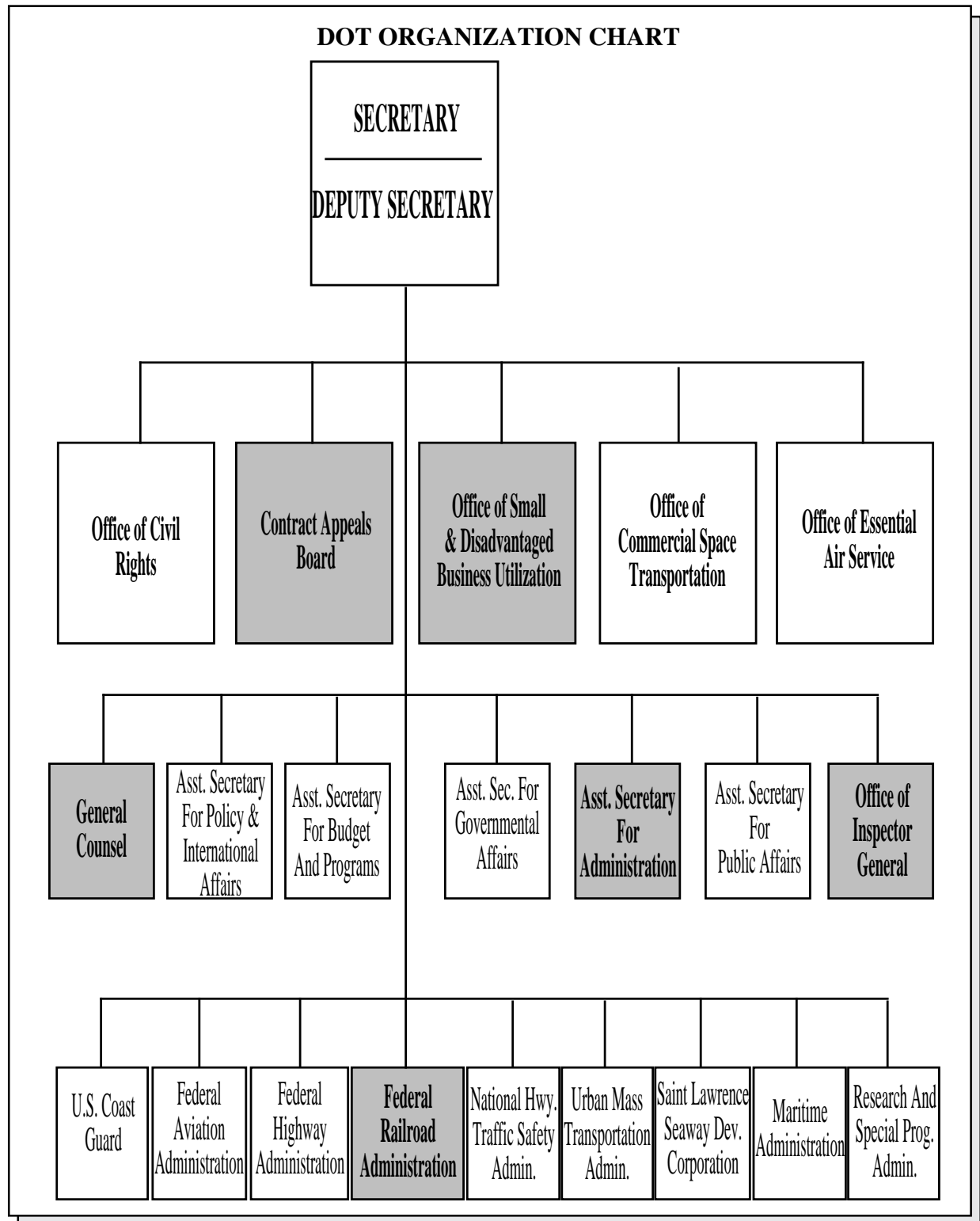
## **4.1 TYPICAL ORGANIZATION WITHIN AGENCIES**

Agencies are organized to maximize the use of resources in fulfilling their missions to ensure management control consistent with the delegation of responsibilities and authorities, and, to some degree, to reflect the management prerogatives of agency heads and their principal assistants.

There are differences in organization among the executive agencies. For example, part of the mission of the Department of Labor (DOL) is to ensure that various labor laws are implemented and enforced. Acquisition is important to DOL, but it is not a predominant function. Accordingly, Labor's procurement executive is a director for both "administrative" and "procurement" programs and reports to an Assistant Secretary for Administration and Management.

On the other hand, a major part of the mission of GSA is to make certain items of supplies and services available to all executive agencies. Because this responsibility requires a large, well-managed acquisition organization, the procurement executive is GSA's Associate Administrator for Acquisition Policy and reports directly to the agency head (or deputy).

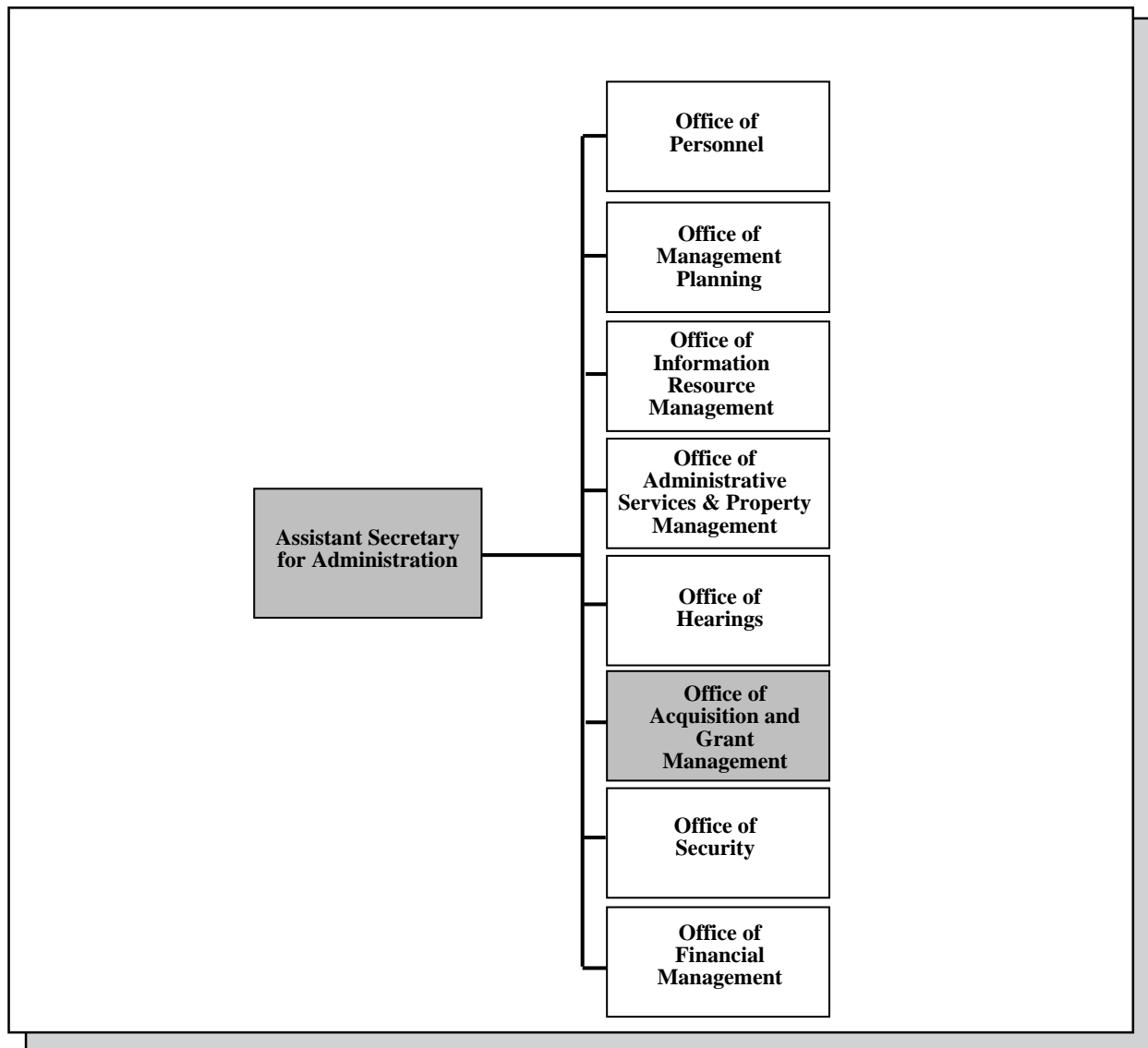
The U.S. Department of Transportation (DOT) is an example of an agency with multiple missions. DOT is organized as shown in the following exhibits.



*Exhibit 4-2. DOT Organization Chart.*

Note that DOT's mission is embodied in nine mission-oriented organizations, the U.S. Coast Guard, seven administrations, and a corporation.

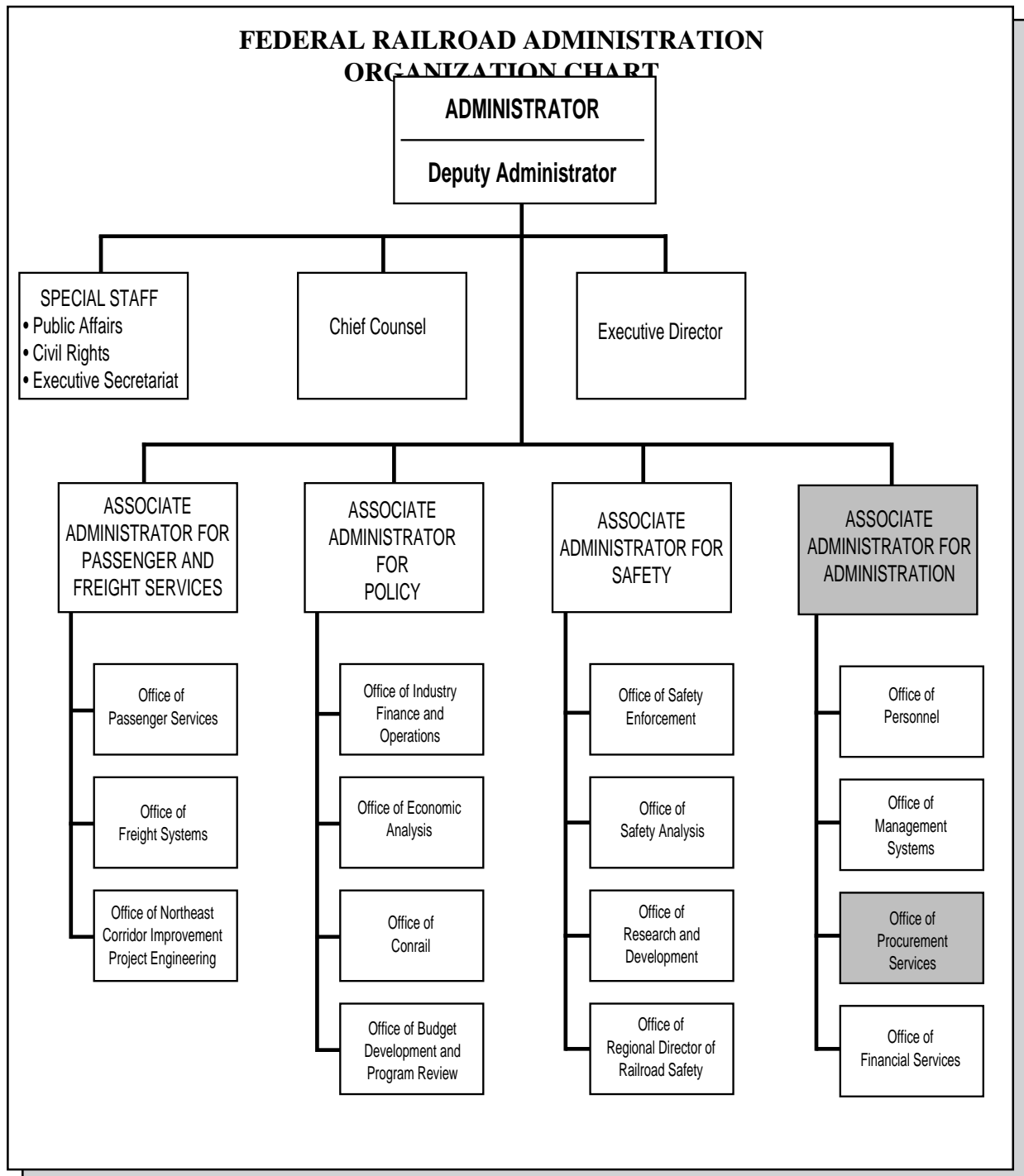
ACQUISITION ROLES AND RESPONSIBILITIES  
WITHIN AN AGENCY (THE PLAYERS)



## CHAPTER 4

Under the Secretary's office there is an Assistant Secretary for Administration (ASA). The ASA reports to the Secretary on a broad range of responsibilities. Because of the major importance of acquisitions and grants within DOT, the ASA has established an Office of Acquisition and Grant Management (OAGM). The OAGM is responsible for implementing and supplementing the FAR and has done so by issuing and maintaining the Transportation Acquisition Regulation (TAR). A member of the OAGM staff is also a member of the Civilian Agency Acquisition Council (CAAC) that is part of the FAR maintenance organization. The OAGM also has policy, management, and reporting authority and responsibilities that cross all nine of the mission-oriented organizations.

ACQUISITION ROLES AND RESPONSIBILITIES  
WITHIN AN AGENCY (THE PLAYERS)



*Exhibit 4-4. Federal Railroad Administration Organization Chart.*

This organization is one of the nine mission-oriented organizations. Note that the organization structure mirrors that of the Office of the Secretary in that acquisition (i.e., “Office of Procurement Services”) is the responsibility of the Associate Administrator for Administration.

Within the Federal Railroad Administration, acquisition operations are performed within the Office of Procurement Services. The head of that office reports to the Associate Administrator for Administration who reports to the Administrator. It enters into contracts on behalf of the requiring activities within the Federal Railroad Administration (e.g., the Office of Research and Development, the Office of Northeast Corridor Improvement Project Engineering, etc.). However, the broad acquisition policies, reporting requirements, and regulatory controls flow from the Office of Acquisition and Grant Management.

The DOT organization (Exhibit 4-4) is complex and may not closely correspond with your agency's organization. What is important is to be able to identify the people and the organizations that play important roles in the process.

*Thinking back to the vignette at the beginning of this chapter, Jane realized that one source of information on the procurement line of authority is the agency organization chart. While a "wiring" diagram doesn't contain all of the information needed, it can lead you to additional information. Jane found that the DOT organization is different from that of her former agency but that the delegations of authority and responsibility followed similar patterns (e.g., broad agency policy at the top and procedural details at lower levels.)*

#### **4.1.1 Top Agency Officials**

##### **Agency Head and Staff**

The agency head establishes overall agency policy, appoints persons to fill key positions, and has "unlimited" acquisition authority. The agency head sometimes makes key acquisition decisions, such as in source selection. Agency heads must ensure that planning, programming, and budgeting systems are established and maintained so as to ensure the efficiency and effectiveness of the acquisition function. The agency senior acquisition executive (see below) and other staff and department heads are normally delegated specific authorities to act for the agency head.

Also, in many instances, legal counsel is part of the agency head's immediate staff. Legal counsel may participate in formulating agency acquisition policy, review contract actions for legal sufficiency, and advise acquisition officials on protests, disputes, and other complex issues.

##### **Comptroller, Finance, and Accounting**

Financial management is under the office of the comptroller (or similarly titled official). The comptroller participates in budget development and prepares the agency's budget submission to OMB. Once money becomes available to the agency, the comptroller controls the commitment,



ACQUISITION ROLES AND RESPONSIBILITIES  
WITHIN AN AGENCY (THE PLAYERS)

obligation, and disbursement of funds. Every contract (and most contract modifications) involves the obligation (or de-obligation) of funds. The cognizant financial officer in the comptroller's office certifies that the required amount and type of money is available for each contract action. In some agencies, the comptroller also provides pricing, audit, and other financial support services to assist the CO.

Senior Procurement  
Executive

Often, the highest level of acquisition authority within an agency is the agency procurement executive (PE). Generally, the procurement executive establishes major acquisition policies and ensures compliance with them. "Procurement Executive" is a functional title. The individual with this responsibility may be an Assistant Secretary, Assistant Administrator, or other high-level official.

#### 4.1.2 Types of Organizations

Functional (Mission)  
Divisions

Functional divisions of an agency are established to support agency missions and may mirror the "headquarters" organization. For example, functional divisions of the Department of the Navy include the Air Systems Command (NAVAIR) and the Sea Systems Command (NAVSEA). Within those commands there are legal staff comptrollers, acquisition personnel, and mission-oriented organizations such as program offices, logistics, quality assurance, etc. Another example includes the functional (mission) divisions within GSA. They include:

- Public Buildings Service (PBS). The PBS has broad responsibilities for acquiring through purchase or lease, buildings and other real estate for use Governmentwide. PBS also has some responsibility for maintenance of public buildings.
- Federal Supply Service (FSS). The FSS is responsible, on a Governmentwide basis, for acquiring and maintaining stocks of certain supplies; for acquiring office furniture and fixtures, and certain power and hand tools; for purchasing or leasing motor vehicles; and for establishing and maintaining "schedule" contracts (see Section 8.1.2, "Orders Against Contracts/Agreements").
- Office of Information Resources Management (OIRM). OIRM is responsible, on a Governmentwide basis, for the acquisition of automatic data processing equipment (ADPE) and related services. OIRM may make the purchase or authorize the requiring agency to do so. OIRM also establishes schedule contracts for some ADPE and related services. A major responsibility of OIRM is to provide Governmentwide telecommunications systems and services.

Each of the above GSA organizations is a contracting activity (as is the head of NAVAIR and NAVSEA). The head of a contracting activity (HCA) is generally the next level of acquisition authority below the acquisition executive and has overall responsibility for managing the contracting activity.

Within a contracting activity, the HCA may delegate authority to divisions, branches, sections, etc., along organizational lines. The appointment of COs and their dollar level of authority is generally managed within the contracting activity by the HCA or a staff office under the HCA.

#### Field Activities

Some agencies or functional divisions may retain contractual authority at the headquarters level and perform all acquisition activities essentially within the “headquarters.” Other agencies (GSA, EPA, Defense agencies), or functional divisions within agencies, that have nationwide or worldwide responsibilities, delegate contractual authority, in varying degrees, to the field activities.

## 4.2 KEY ACQUISITION PERSONNEL

### 4.2.1 The Law Of Agency

Recall the question posed by the Supreme Court as quoted in Chapter 3 (Section 3.1.1) relative to the **validity** of a Government contract: “Is the act performed by someone having the authority to act?” In Government contracting it is also necessary to consider the “law of agency.”

Under the law of agency, one party, known as the principal, appoints another party, known as an agent, to enter into a business or contractual relationship with a third party. In Governmental contracting the:

- Government is the principal.
- Contracting officer (CO) is the agent.
- Third party is the contractor.

What this all means is that, for a Government contract (including modifications and changes) to be valid, it must be entered into by a duly appointed CO acting within the scope of his or her authority (to act). You will see later that the CO may delegate authority for some decisions to others.

#### 4.2.2 Roles and Responsibilities

##### Contracting Officers

###### FAR 1.6

The CO is the key operational person in the Federal acquisition process. The fundamental authority and responsibilities of a CO as summarized from FAR 1.602 are shown on Exhibit 4-5. The decision making authority of COs, as well as the limits on that authority, are also established in case law (e.g., decisions by the courts, Comptroller General, and Boards of Contract Appeals), agency supplemental regulations, and specific delegations of authority by the head of the agency.

As noted in Exhibit 4-5, a CO may have the authority to enter into, administer or terminate contracts. Sometimes, because of the volume and scope of an agency's contracting mission, a CO may be appointed to perform all or any one of the three functions. Therefore a CO may be appointed as:

- **PCO** — Procuring Contracting Officer. Manages the planning, solicitation and award of a contract; signs it.
- **ACO** — Administrative Contracting Officer. Administers a contract signed by the PCO (if assigned to do so).
- **TCO** — Termination Contracting Officer. Manages termination actions, disposal of property, etc., following a termination action by a PCO.

A “short” list of “approve or disapprove” tasks that may be performed by a CO (if so authorized) is shown on Exhibit 4-6. A comprehensive listing could include 150 or more tasks that may be the responsibility of the CO.

##### Other Contracting Personnel

Because the CO has many functions to perform, he or she is usually supported by a staff of contracting personnel (GS-1102) and procurement assistants (GS-1106). Titles for contracting positions include:

- **Contract Specialist.** Has special knowledge of preaward and postaward procedures. May plan or conduct the contracting process, from reviewing the purchase request through delivery and contract closeout. A contract specialist may be assigned to perform specialties within the process (see below).
- **Contract Negotiator.** Has special knowledge and ability to enter into contract negotiations and reach agreements with a prospective contractor.
- **Contract Administrator.** Has special knowledge of postaward contracting procedures to ensure compliance with the terms and conditions of contracts.

- **Contract Price/Cost Analyst.** Has special knowledge of cost and price analysis techniques and analyzes proposals, contract changes, repricing agreements; supports price negotiations.
- **Contract Termination Specialist.** Has a knowledge of post-award procedures and negotiation techniques necessary to represent the Government (perhaps as a TCO) in the settlement of termination claims.
- **Procurement Analyst.** Has a broad knowledge of acquisition policies and procedures necessary to plan, analyze, or evaluate acquisition programs; reviews proposed contract actions; develops regulatory material; assists subordinate activities.

Program and Re-  
quirements Managers

Senior level managers identify the need for supplies or services to support their programs, determine strategies for meeting the need (including in-house performance vs. contracting), and, when the decision is to contract, prepare and submit purchase requests to the CO.

After acceptance of the purchase request, the managers and/or their staffs often perform such functions as reviewing technical and business management proposals from offerors, participating in fact finding and negotiations, and ranking proposals against technical and management evaluation factors. After contract award, they may perform such contract administration management duties as inspection and acceptance of deliverables, as representatives of the CO (see below).

Contracting Officer  
Representatives and  
Technical Represen-  
tatives

The CO may choose to delegate limited authority for certain contract-related decisions to designated individuals. Such individuals are often known as:

- **CORs** — Contracting Officer's Representatives.
- **COTRs** — Contracting Officer's Technical Representatives (the COTR works for or represents the requiring activity and manages the performance of the contractor from a technical perspective).

COs appoint CORs and COTRs and specify their authority in writing. The appointed personnel may perform only those functions delegated to them, and neither acquisition nor non-acquisition personnel may sign contracts or modify contracts or take any other action that has been reserved to the CO.

ACQUISITION ROLES AND RESPONSIBILITIES  
WITHIN AN AGENCY (THE PLAYERS)

Typical post-award duties (especially for a COTR) include:

- Monitoring technical performance by reviewing progress reports, making plant visits, etc.
- Inspecting deliverables and preparing receiving reports.
- Comparing progress with delivery schedules and cost objectives.
- Advising the CO of suspected problems with contract performance.
- Providing technical assistance to the CO regarding changes and modifications.

Quality Assurance  
Personnel

As COTRs, quality assurance personnel specialize in the tasks of inspecting and accepting (or recommending rejection of) items delivered under Government contracts. They may also be responsible for reviewing the acceptability of a contractor's quality assurance procedures and programs.

Transportation  
Managers, Logistics  
and Supply Managers

Transportation managers ensure compliance with transportation rules and regulations and determine the best shipping methods. Logistics and supply managers perform such functions as forecasting needs, identifying economic ordering quantities, initiating purchase requests, and managing inventories.

Property Managers

Property managers may be appointed as CORs for such functions as arranging for the furnishing of Government property to a contractor, monitoring the contractor's compliance with the property clauses of the contract, assessing any damage to Government property, and recommending the method or methods for disposing of property.

Auditors and  
Accountants

Auditors and accountants audit contractor accounting and estimating systems, cost and pricing data, invoices, and the like. They also assist the CO with such functions as establishing positions on proposed elements of cost, evaluating offerors' financial responsibility, and establishing indirect cost rates for billing purposes.

Legal Counsel

Lawyers typically review proposed solicitations, awards, and contracts for legal sufficiency, assist COs in responding to protests and disputes, and advise COs on the interpretation and applicability of laws, regulations, case law, and contract clauses.

Small Business  
Advocates

Working independently or with the CO, these advocates perform such functions as planning set-asides, identifying "break-out opportunities," reviewing subcontracting plans, and otherwise supporting attainment of small business goals.

## CHAPTER 4

### Competition Advocates

Competition advocates review acquisition plans and analyze specifications to identify and discourage “barriers” to full and open competition. They also review justifications for other than full and open competition.

### Other Interested Parties

Numerous other specialists or program-related persons may become involved with a particular acquisition or program; e.g., performance measurement specialists, value engineering program specialists, streamlining advocates (eliminating unnecessary specifications).

## **CONTRACTING OFFICERS' AUTHORITY AND RESPONSIBILITIES**

### **Authority:**

- Contracting officers may enter into, administer, or terminate contracts and make related determinations and findings.
- Contracting officers may bind the Government only to the extent of the authority delegated to them.
- Contracting officers shall receive from the appointing authority clear instructions in writing regarding the limits of their authority.
- Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.
- No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, and all other applicable procedures, including clearance and approvals, have been met.

### **Responsibilities:**

- Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.
- In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgement. Contracting officers shall:
  - Ensure that the requirements of pertinent laws, regulations, etc., have been met.
  - Ensure that sufficient funds are available for obligation.
  - Ensure that contractors receive impartial, fair, and equitable treatment.
  - Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

*Exhibit 4-5. Contracting Officers' Authority and Responsibilities.*

### **SOME “APPROVE OR DISAPPROVE” CO TASKS**

A CO may be required to approve, disapprove, and/or execute:

- Advance procurement plans.
- Small business set-asides.
- Solicitations.
- Cost and profit negotiation objectives.
- Negotiation memoranda.
- Small business subcontracting plans.
- Contracts.
- The allowability of costs.
- Contractor property control, purchasing, or quality assurance procedures.
- Contractor’s requests for assignment of claims, leasing, travel, or placement of subcontracts.
- Individual sureties.
- Cure notices.

*Exhibit 4-6. Some “Approve or Disapprove” CO Tasks.*

## **4.3 THE ACQUISITION FUNCTION IN OPERATION**

Using the foregoing outline of organizations and personnel as the basis, a typical acquisition action may involve the following six steps in sequence:

1. A program or requirements manager identifies a need for supplies or services that can best be met through the acquisition process. The manager drafts a specification or statement of work, assisted in the effort by technical, quality, and other personnel. This and other material is “packaged” as a Purchase Request (PR).
2. The PR must be approved at the organizational levels prescribed in agency regulations.
3. The approved PR generally goes to the Comptroller (i.e., Finance Office) for a commitment of funds—for the amount of money that the program or requirements manager estimates will be needed for a contract. The PR is forwarded to the CO.

## CHAPTER 4

4. The CO reviews the PR. If it is acceptable, the CO, with assistance from the program or requirements manager:
  - Researches the market, plans the solicitation and evaluation of offers, and solicits offers.
  - Receives and evaluates offers.
  - Selects the source and awards the contract.
5. The contracting officer administers the contract or assigns it, in whole or in part, for administration.
6. The program or requirements manager and any designated COTRs (assisted by field organizations, if necessary) administer assigned terms and conditions of the contract, to the extent authorized by the CO.

The above process will continue until the work is completed and the contract closed.



# CHAPTER 5

## INTRODUCTION TO THE ACQUISITION PROCESS

### *The Livingston's House Dilemma*

*Mr. and Mrs. Livingston decide to build a house on a lot they own near a lake. They want to use it as a vacation house for the next few years, and then make it their permanent retirement home.*

*They decide to start their project immediately to take advantage of current low interest rates and to have the house ready for use next spring — about 9 months from now.*

*Having made the decision to proceed, they realize that they must make decisions about the house itself:*

- *Should they design it themselves?*
- *Should they just give a good builder a sketch and ask the builder to “fill it in” while doing the actual building?*
- *Would it be better to hire an architect to create a complete design and then get a good builder to build it according to the design?*

*Mr. and Mrs. Livingston decide to use an architect. They engage Ms. Allen, an architect of good reputation whose office is near the building site. Ms. Allen develops a set of plans and specifications that they like.*

*They are not sure who should build the house. After discussions with Ms. Allen, they decide to invite builders from the area to submit bids. Four builders submit bids. Based on their discussion with the architect, the Livingstons believe the house will cost about \$130,000. The bids they receive are:*

<i>Bidder A</i>	<i>\$160,000</i>
<i>Bidder B</i>	<i>134,000</i>
<i>Bidder C</i>	<i>116,000</i>
<i>Bidder D</i>	<i>105,000</i>

## CHAPTER 5

*The Livingstons are excited about the bid from Bidder D. But Bidder D does not intend to start right away, and probably would not have the house ready until next fall—if then. Also, Bidder D's timing might have a serious impact on financing.*

*Next they consider Bidder C. They learn that until recently he was a carpenter in the area. Word of mouth has it that he never was able to hold a job for more than a few months because of his lack of skill and poor work habits. The Livingstons decide that it would be too risky to give him the job.*

*Then they consider Bidder B. Mr. Butler has a good reputation, does good work, finishes jobs on schedule, and has solid recommendations from several families for whom he had built similar homes.*

*After a meeting with Ms. Allen and Mr. Butler, the Livingstons sign a contract with Mr. Butler. Because of the distance from their present home to the building site, they realize they will not be able to see that the work is being done properly. They engage Ms. Allen to make periodic inspections of the work and to certify progress so that Mr. Butler can get progress payments from the bank. It is clearly understood, however, that any change or any faulty work has to be reported to the Livingstons so that they can decide what action to take.*

### **Learning Objectives**

- 5-1 State the three phases of the acquisition process and related business issues.
- 5-2 State the four main functions of the presolicitation phase.
- 5-3 State the three main functions of the solicitation-award phase.
- 5-4 State the seven main functions of the post-award administration phase.
- 5-5 Describe the relationship between acquisition goals and functions.

*Exhibit 5-1. Learning Objectives.*

## **5.1 ACQUISITION PHASES AND RELATED BUSINESS ISSUES**

Perhaps you have had an experience similar to the Livingstons'. You may have faced the same issues and, given those issues, may have had to make the same basic business decisions:

### **5.1.1 The Presolicitation Phase**

The purpose of this phase is to (1) decide whether to contract for the requirement and, if that is the decision, (2) lay the groundwork for soliciting and awarding the contract. Related issues:

1. What do we need, and is contracting the best alternative for satisfying that need?
2. How do we initiate an acquisition, in terms of such things as approvals, funding, and information on the market?
3. How can we best specify exactly what we want?
4. Who should we consider for the work, what factors should apply in making our selection, and what method (i.e. sealed bidding or negotiations) should be used to award the contract ?

### **5.1.2 The Solicitation And Award Phase**

The purpose of this phase is to (1) solicit offers, (2) evaluate offers, and award the contract. Related issues:

1. How do we solicit offers from the contractors in whom we are interested and under what terms and conditions?
2. How do we evaluate the submitted offers and identify that offer which represents the best value?
3. How do we award the contract and handle any complaints from offerors who were not selected?

### **5.1.3 The Post-Award Phase**

The purpose of this phase is to administer the awarded contract. Related issues:

1. What is required to initiate work under the contract?
2. How can we be sure the work is done according to the contract, and what steps can we take if things go wrong?
3. When and how do we pay the contractor?
4. How do we close the contract out?
5. What happens if we decide to change the design of the item ?
6. What if we need to terminate the contract, either because we no longer want the deliverable or because the contractor is not performing as required by the contract?
7. What if the contractor alleges that we have not lived up to our end of the contract?

Each of these issues represents an acquisition function, whether the acquiring is being done by the Livingstons, corporations, State or local Governments, or the Federal Government. For each of these issues, you will find a corresponding function in Exhibit 5-2 under the matching phase and number.

## 5.2 FUNCTIONS OF THE FEDERAL ACQUISITION PROCESS

### FUNCTIONS OF THE ACQUISITION PROCESS

#### Functions of the Presolicitation Phase

1. Determination of Need.
2. Initiating the Procurement.
3. Analysis of Requirement.
4. Sourcing.

#### Functions of the Solicitation-Award Phase

1. Solicitation.
2. Evaluation (Sealed Bid and Negotiation).
3. Award.

#### Functions of the Post-Award Administration Phase

1. Start-up.
2. Quality Assurance.
3. Payment and Accounting.
4. Closeout.
5. Contract Modification.
6. Termination.
7. Claims.

*Exhibit 5-2. Functions of the Acquisition Process.*

What is Unique About the Federal Acquisition Process?

While it involves the same basic phases and functions as any acquisition process, the Federal acquisition process differs greatly in the details of how those functions are performed. In the first four chapters, you learned about:

- The goals of the Federal acquisition process (see Exhibit 5-3) and the environmental constraints on goal accomplishment.
- The role of the Congress, the President, and the Judiciary in acquiring supplies and services for the Government.
- The basic statutes and regulations that govern the acquisition process.
- The key players and participants in the Federal acquisition process and their respective roles and responsibilities.

These all weigh heavily in determining the steps in performing the functions of Exhibit 5-2 and how those steps are performed. You will learn that the Federal acquisition process, though prescribed and controlled to a large degree, still requires the exercise of judgement on the part of the players, particularly the CO. You will also learn how the process can, if properly and competently executed, help satisfy the goals in Exhibit 5-3.

### **GOALS OF THE FEDERAL ACQUISITION PROCESS**

1. Obtain the optimum market response to requirements for supplies and services, in terms of:

- Quality.
- Timeliness.
- Price.

While:

- Accomplishing socioeconomic objectives.
- Minimizing business and technical risks.
- Maximizing competition.
- Maintaining integrity.

2. Assure that purchased supplies and services are:

- Delivered or performed when and where specified in the contract.
- Acceptable, in terms of conforming to the contract's specifications or statement of work.
- Furnished in compliance with other terms and conditions of the contract.

*Exhibit 5-3. Goals of the Federal Acquisition Process.*

Relationship Between  
Goals and Functions

In the final analysis, your performance of acquisition functions and related duties should be judged not by:

- How faithfully you have observed the letter of the applicable laws and regulations (although your acquisitions must comply with those laws and regulations).
- The extent of competition for the requirement (although maximizing competition is a subgoal of the process).
- Whether you have obtained a lower price than in prior acquisitions for the supply or service (although price is an important factor .)

Rather, your performance at every step of the way in the acquisition process should, in the final analysis, be judged by its contribution to accomplishing the overall goals in Exhibit 5-3.

For example, you may perform every step of the procurement process in apparent compliance with the letter of the applicable laws and regulations. You may have succeeded in obtaining independently prepared offers from three competitors. Yet the prices might be unacceptably high because you:

- Entered the market at the wrong time (e.g., buying produce out of season).
- Used a specification that unnecessarily and unwittingly limited competition to a market segment characterized by premium prices.
- Ordered an uneconomic quantity.
- Imposed an unnecessarily tight delivery schedule relative to delivery terms and conditions that are prevalent in that market.
- Used the wrong type of contract (e.g., a firm fixed price contract for a market that is expecting a high rate of inflation during the period of contract performance).
- Imposed warranty requirements that are far in excess of what is customary for that market.

The bottom line: No function of the acquisition process or any related duty should be viewed as an end in itself. Rather, as you read about each function and duty in the following chapters, always be mindful of the overall goals in Exhibit 5-3.

# THE ACQUISITION PROCESS

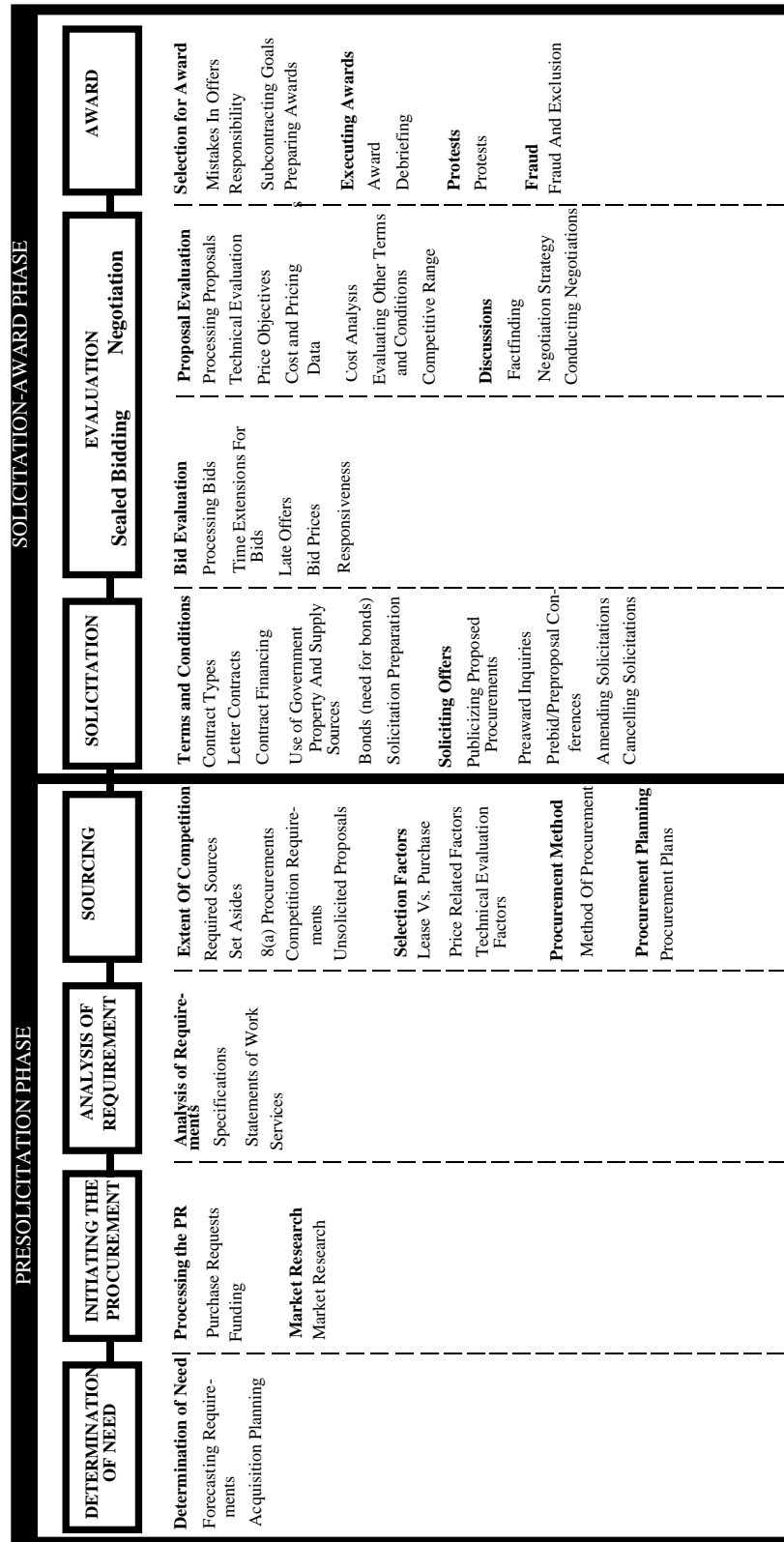


Exhibit 5-4. Federal Acquisition Process Chart.



# THE ACQUISITION PROCESS

POST-AWARD ADMINISTRATION PHASE						SPECIALTIES			
START-UP	QUALITY ASSURANCE	PAYMENT AND ACCOUNTING	CLOSEOUT	CONTRACT MODIFICATION	TERMINATION	CLAIMS	SPECIALIZED AREAS		
<b>Planning</b> Contract Administration Planning Post-Award Orientations	<b>Monitoring and Problem Solving</b> Monitoring, Inspection and Acceptance Delays Stop Work Remedies	<b>Payment</b> Limitation Of Costs Invoices Unallowable Costs Assignment Of Claims Collecting Contractor Debts	<b>Closeout</b> Closeout	<b>Modifications/Options</b> Contract Modifications A. Contract Modifications B. Exercising Options	<b>Termination</b> Termination A. Determine whether to terminate for convenience or default B. Terminating for convenience C. Terminating for default	<b>Claims</b> Claims	ADP/Telecommunications Construction A&E Systems Procurement Simplified Purchasing Real Property Leasing		
<b>Ordering</b> Orders Against Contracts/Agreements)	A. Selection B. Cure or slow cause notice C. Liquidated damages D. Rejection of work E. Express warranty or guarantee F. Implied warranty G. Latent defects	Progress Payments Price and Fee Adjustments			Bonds (administering bonds)				
<b>Subcontracting</b> Consent To Subcontracts		<b>Accounting and Defective Pricing</b> Accounting and Cost Estimating Systems Cost Accounting Standards Defective Pricing							
	<b>Property</b> Property Administration								
	<b>Reporting Performance Problems</b> Fraud And Exclusion								

Exhibit 5-4. Federal Acquisition Process Chart (continued)

## CHAPTER 5

es depart markedly from the process described in the next several chapters, in terms of (1) steps in the process, (2) how those steps are performed, and (3) in the roles and responsibilities of the CO and other officials for the acquisition.

### Alternative Acquisition Procedures

FAR 15.613
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# CHAPTER 10

## STANDARDS OF CONDUCT



"All I did was give a friend of mine some information  
on a competitor's proposal."

### **Learning Objectives**

- 10-1 Identify standards of conduct that apply to the procurement process.
- 10-2 Provide examples of activities that are prohibited under each standard.

*Exhibit 10-1. Learning Objectives.*

## **CHAPTER INTRODUCTION**

The public expects Government operations of all kinds to be open, honest, and fair-dealing. This is especially true relative to procurement. There are two principal reasons for this public concern:

- Public interest in how their money is spent — around \$200 billion per year on Government contracts.
- Concern among those competing for Government contracts about the integrity of the process.

You will probably see much material and hear many briefings or presentations pertaining to the broad area of ethics in Government contracting. Some of the material is redundant and may be addressed under titles such as:

- Standards of Conduct.
- Ethics.
- Conflicts of Interest.
- Improper Business Practices.

This chapter summarizes the FAR coverage of the subject, especially as contained in Part 3. Be sure that you consult regulations within your agency for more specific guidance.

## 10.1 STANDARDS OF CONDUCT (GENERAL)

Government officials involved in the expenditure of public funds have positions of trust and grave responsibility that require the observance of the highest ethical standards. Such officials must:

- Earn the highest degree of public trust.
- Display impeccable standards of conduct.

The resulting standards state that Government business shall be conducted in a manner beyond reproach. Except as authorized by the statute or regulations; they shall be conducted with:

- Complete impartiality.
- Preferential treatment to none.

The caveat “except as authorized by statute or regulation” refers to such preferential programs as small and small/disadvantaged business set asides.

To achieve those standards, the regulation requires that you, in your Government-contractor relationships:

- Avoid any conflict of interest.
- Avoid the appearance of any conflict of interest.
- Conduct yourself so that you would have no reluctance to make a full public disclosure of your actions.

The violation of the standards of conduct may result in fines, imprisonment, dismissal, debarment, or other penalties.

### **EXECUTIVE ORDER 11222**

“STANDARD OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES”

#### **POLICY**

“Where Government is based on consent of the governed, every citizen is entitled to have complete confidence in the integrity of his Government. Each individual officer, employee or advisor of Government must help to earn and must honor that trust by his own integrity and conduct in all official actions.”

## 10.2 STANDARDS OF CONDUCT (GOVERNMENT PERSONNEL)

Generally, a Government official or employee must avoid any action which might result in, or create the appearance of:

- Using public office for private gain.
- Giving preferential treatment to any person.
- Impeding Government efficiency or economy.
- Losing complete independence or impartiality.
- Making a Government decision outside official channels.
- Affecting adversely the confidence of the public in the integrity of the Government.
- Disclosing proprietary or source selection information to unauthorized sources.

These standards apply to all Government personnel, with special emphasis on those persons involved in the acquisition process, including:

- Contracting personnel.
- Technical and engineering personnel
- Financial personnel
- Clerical, support and administrative personnel
- Program/project managers and agency management
- Contract support personnel
- Anyone else who: (1) determines requirements, (2) evaluates technical proposals, or (3) prepares specifications

The Federal Acquisition Regulation and Title 18 of the United States Code specifically prohibit certain types of conduct by Federal employees. Exhibit 10-3 lists some of those prohibitions.

### **PROHIBITED CONDUCT**

- Bribes
- Representing contractors
- Making or recommending official decisions in which you have a financial interest
- Conspiring to defraud the Government
- False statements and cover-ups
- Disclosing source selection or proprietary information
- Contracting with Government employees
- Contracting with Members of Congress

*Exhibit 10-3. Prohibited Conduct.*

### 10.2.1 Bribes

FAR 3.101-1

Do not solicit or accept any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who:

- Has or is seeking Government business with your agency.
- Conducts activities that are regulated by your agency (e.g., FCC, FAA, EPA).
- Has interests that may be substantially affected by your performance or nonperformance of your official duties.

Policies vary from one agency to another on whether you may accept items of "nominal" value. Prior to accepting any such item, check your agency's individual regulations on standards of conduct. Even where your agency's regulations might be construed to permit receipt of the item, you still would be best advised to refrain from accepting the item.

Also note that, under 18 USC § 201, it is a criminal offense for a public official to directly or indirectly corruptly seek, receive, or agree to accept, anything of value personally in return for:

- Being influenced in an official act.
- Committing or allowing fraud.
- Violating his/her lawful duty.

**Penalty:** Fine of not more than 3 times the value of the bribe, or imprisonment of not more than 5 years, or both; may also be disqualified from holding office or position of trust or profit with the United States.

That same statute also makes it a criminal offense for such a public official to directly or indirectly seek, receive, or agree to accept anything of value personally for, or because of, any official act performed or to be performed. The only exception are payments authorized by law, such as application or filing fees.

**Penalty:** Fine of not more than 3 times the value of the illegal gratuity, or imprisonment of not more than 2 years, or both.

### 10.2.2 Representing Contractors

Per 18 USC § 205, do not act on behalf of a party in any matter, including a claim or contract, in which the United States has an interest. This prohibition extends to matters before any agency or tribunal.

**Penalty:** Fine of not more than \$10,000, imprisonment of not more than 2 years or both.

Also, per 18 USC § 207, do not take a position with a contractor and then represent that contractor:

- On any matter in which you had personally and substantially participated as a Government official
- On matters that were under your official responsibility during your last year of Federal service (within two years after leaving the Government)

### 10.2.3 Official Decisions In Which You Have A Financial Interest

Per 18 USC § 208, do not participate personally and substantially in a particular matter in which any of the following have a financial interest:

- You.
- Your spouse.
- Your minor child.
- Your partner.
- An organization in which you are serving as officer, director, trustee, partner, or employee.
- A person or organization with whom you are negotiating for prospective employment.

This restriction may be waived by the appointing official if the financial interest is found to have no affect on the integrity of your services.

**Penalty:** A fine of not more that \$10,000 or imprisonment of not more than 2 years, or both.

### 10.2.4 Conspiring to Defraud the Government

Per 18 USC § 286, do not enter into any agreement or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim.

**Penalty:** Fine of not more than \$10,000 or imprisonment of not more than 10 years or both.

In addition, 18 USC § 371 more generally prohibits any conspiracy by two or more persons to commit any offense against the United States, or to defraud the United States or any agency thereof.



**Penalty:** Each person who acts to effect the conspiracy will be fined not more than \$10,000 or imprisoned not more than 5 years or both; unless the offense which is the object of the conspiracy is a misdemeanor, then the punishment shall not exceed the maximum punishment provided for such misdemeanor.

### 10.2.5 False Statements and Cover-Ups

Per 18 USC § 1001, do not falsify, conceal or cover-up by any trick, scheme, or device material fact, statements or representations or make or use any false writing or document knowing it to contain any false, fictitious or fraudulent statement or entry.

**Penalty:** Fine of not more than \$10,000 or imprisonment of not more than 5 years or both.

### 10.2.6 Disclosing Source Selection or Proprietary Information

Make no unauthorized disclosures of:

- A contractor's proprietary information.
- Government source selection information.

An overriding general rule is that a Government employee shall not release information to any one source that would give that source an unfair competitive advantage over another source. What may be disclosed varies from phase to phase of the acquisition process.

The following is a summary of what may be disclosed during each phase.

#### Presolicitation Phase

FAR 14.211 and 15.402(b)
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Do not disclose any information on a proposed procurement or future solicitation to any prospective contractor or to any other unauthorized party, except through:

- Release of long-range acquisition estimates (FAR 5.404).
- CBD synopses (FAR 5.201).
- Presolicitation notices prepared by the CO and synopsized (FAR 14.205-4(c) and 15.404) .
- Presolicitation conferences conducted by the CO (FAR 15.404).
- Solicitations for information or planning purposes issued by the CO (FAR 15.405).

## CHAPTER 10

### Solicitation Phase (Prior to Evaluating Offers)

FAR 14.211, 15.411,  
15.413, 52.214-6, &  
52.215-14

- Only the CO, the CO's superiors, or others specifically authorized may discuss the solicitation with competing contractors.
- Only the CO, CO's superiors, or others specifically authorized may transmit technical or other information on the solicitation to competing contractors.
- Instruct offerors to put their questions in writing and do it early, as provided in 52.214-6 and 52.215-14.
- Do not disclose information that would afford one competing contractor an advantage over others. Among other things:
  - Before bid opening, do not disclose the number or identity of bids received.
  - In negotiated procurements, do not disclose the identity of any offeror or the number of offers received.
- Furnish only general information upon request that would not be prejudicial to other competing contractors. Otherwise, amend the solicitation.

### Evaluation/Award Phase

FAR 14.402,  
14.404-4, 15.413,  
& 15.610(d)

#### In sealed bidding:

- Bids may be examined by the public (after bid opening).
- Bidders may restrict public disclosure of descriptive literature.

However, a restriction may render a bid nonresponsive under the conditions prescribed in FAR 14.404-4.

#### In negotiated procurements:

- Offerors may restrict disclosure or use of data in proposals.
- Do not disclose the contents of any offer to the public or other offerors.
- Only the CO, CO's superiors, or others specifically authorized may exchange data with offerors and talk to contractors.

### Post-Award Phase

FAR 15.103(b)

#### When debriefing unsuccessful offerors, do not disclose the:

- Relative merits or technical standings of competitors.
- Evaluation scoring.
- Information not releasable under Freedom of Information Act (FOIA).

All Phases

FAR 9.105-3

Do not disclose information on an offeror's responsibility, except as provided in the FOIA.

In addition to these FAR provisions on disclosure, 18 USC § 1905 forbids publishing, disclosing, allowing to be seen or examined, or the making known in any manner or to any extent not authorized by law any information obtained in the course of employment or official duties by reason of examination, investigation, report, or record filed with the officer or employee's agency that concerns or relates to trade secrets, operations, data, sources of income, profits, losses or expenditures, including books and abstracts of such data of any person, firm, partnership, association or corporation.

**Penalty:** A fine of not more than \$1,000, imprisonment of not more than 1 year, or both, and removal from office or employment.

### 10.2.7 Contracting With Government Employees

Do not knowingly award a contract to a:

FAR 3.6

- Government employee
- Business concern or other organization owned or substantially owned or controlled by one or more Government employees

The head of an agency or HCA may authorize an exception only if there is a compelling reason to do so.

### 10.2.8 Contracting with Members of Congress

FAR 3.102

As provided in FAR 3.102, do not award a contract when any member of Congress (or any delegate to Congress or resident commissioner) would have any share or part of the contract or any benefit arising from it."

**EXCERPTS FROM A TYPICAL AGENCY PENALTY GUIDE**

<u>Type of Misconduct</u>	<u>1st Offense</u>	<u>2nd Offense</u>	<u>3rd Offense</u>
Engaging in outside employment without prior written approval:			
a. no conflict present	Warning	Reprimand	Suspended/ Removal
b. conflict present	Reprimand/	Removal	_____
Knowing and willful misstatement or omission of material facts from official documents, contract files, or records.	Reprimand/	Removal	_____
Knowing and willful use of public office for private gain.	Removal	_____	_____
Misconduct whether or not in violation of criminal statute which impairs performance or trustworthiness.	Reprimand/ Removal	Suspension/ Removal	_____
Negligent or willful contract mismanagement.	Reprimand/ Removal	Suspension/ Removal	Removal
Negligent or willful failure to maintain contract files.	Reprimand/ Removal	Suspension/ Removal	Suspension/ Removal
Knowing and willful failure to secure competition when required.	Suspension/ Removal	Suspension/ Removal	Removal
Awarding more than one contract to avoid authority limits or requirements.	Suspension/ Removal	Suspension/ Removal	Removal
Negligent or willful award of contracts in excess of authority.	Reprimand/ Removal	Suspension/ Removal	Removal
Negligent or willful preparation or issuance of contract for unreasonable quantities.	Reprimand/ Removal	Suspension/ Removal	Removal
Knowingly preparing inaccurate estimates in proposal/bid process with resultant losses to Government.	Reprimand/ Suspension	Suspension/ Removal	Removal

*Exhibit 10-4. Excerpts From a Typical Agency Penalty Guide.*

### **10.3 STANDARDS OF CONDUCT (CONTRACTORS)**

Contractors and prospective contractors may not engage in improper business practices that would bring about the situations noted in Section 10.2. Based on a finding that a firm has violated laws or standards of conduct, a CO may:

- Determine that the firm is nonresponsible for the instant procurement under the General Standards on integrity or eligibility.
- Recommend the firm for debarment or suspension to the debarring official.
- Void or rescind contracts in relation to which there has been:
  - A final conviction of bribery.
  - A conflict of interest.
  - Misconduct.

In addition, a number of these standards carry additional statutory penalties. Examples of specific standards that apply to contractors are described in the following sections.

#### **10.3.1 Offers of Employment**

As a general rule, it is unethical to offer employment to a Government employee if the purpose of such an offer is to gain an unfair advantage or otherwise improperly benefit from the offer.

#### **10.3.2 Collusive Pricing**

Offerors must submit prices that are arrived at independently:

- Without (for the purpose of restricting competition):
  - Consultation.
  - Communication.
  - Agreement.
- With any other offeror or competitor relating to:
  - Prices.
  - Intention to submit an offer.
  - Methods or factors used to calculate the prices offered.

### **10.3.3 Contractor Gratuities to Government Personnel**

A contractor's right to receive a contract or to keep a contract may be denied if the agency head determines that the contractor, its agent, or representative offered or gave a gratuity to an officer, official, or employee of the Government for the purpose of obtaining:

- A contract.
- Favorable treatment under an existing contract.

### **10.3.4 Anti-Trust Violations**

Violations that eliminate competition or restrain trade include:

- Collusive bidding.
- Rotated low bids.
- Collusive price estimating systems.
- Follow-the-leader pricing.
- Sharing of the business.

### **10.3.5 Contingent Fees**

A contingent fee is a fee that depends upon the success that a person or concern has in securing a Government contract; such as a:

- Commission.
- Brokerage.
- Percentage.

The payment of contingent fee is considered contrary to public policy because it may lead to "attempted or actual exercise of improper influence." The prohibition against the payment of a contingent fee does not apply to fees paid to a bonafide employee or agency.

This policy is implemented by including the clause "Covenant Against Contingent Fees" in (most) contracts. In the clause, the contractor warrants that "no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bonafide employee or agency."

### 10.3.6 Subcontractor Kickbacks

The standard comes from the "Anti-Kickback Act of 1986." Its purpose is to discourage:

- subcontractors from making payments, and
- contractors from accepting payments,

for the purpose of obtaining or rewarding favorable treatment in connections with a prime contract or a subcontract relating to a prime contract. Exhibit 10-5 shows examples of kickbacks.

EXAMPLE OF KICKBACKS	
<ul style="list-style-type: none"><li>• Money</li><li>• Fee</li><li>• Commission</li><li>• Gift</li></ul>	<ul style="list-style-type: none"><li>• Gratuity</li><li>• Thing of value</li><li>• Other compensation</li></ul>

*Exhibit 10-5. Example of Kickbacks.*

### 10.3.7 Unreasonable Restrictions on Subcontractor Sales

Prime contractors should not unreasonably preclude subcontractors from making direct sales to the Government of the kinds of supplies or services furnished to the prime contractor for use under its contracts with the Government.

## **10.4 PROCUREMENT INTEGRITY**

In 41 U.S.C. 423, the Congress established additional prohibitions—and additional administrative, contractual, civil, and criminal penalties—with respect to:

- Discussions of future employment or business opportunities between Federal procurement officials and competing contractors.
- Bribes and gratuities.
- The unauthorized disclosure of source selection and proprietary information.

Furthermore, this section of law establishes additional postemployment restrictions on Government officers and employees who served as procurement officials prior to separation from the Government.

See section 3.104 of the FAR for the effective dates and implementation of statutory requirements for procurement integrity.